United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11826

COMMONWEALTH OF KENTUCKY, EX REL DEPARTMENT OF ECONOMIC SECURITY, suing on behalf of itself and other States similarly situated, CITY OF LOUISVILLE MUNICIPAL HOUSING COMMISSION, suing on behalf of itself and other Low-Rent Public Housing Authorities similarly situated, and HAROLD M. BOOTH, an employee of the City of Louisville Municipal Housing Commission suing on behalf of himself and other employees of said Housing Commission and of other Low-Rent Public Housing Authorities similarly situated, *Appellants*,

v.

OVETA CULP HOBBY, Secretary of Health, Education and Welfare, and JOHN L. THURSTON, Acting Administrator of Federal Security Agency, and WILLIAM L. MITCHELL, Acting Commissioner of Social Security Administration, *Appellees*.

Appeal from the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. The provisions of the Social Security Act Amendments extend Federal Old Age and Survivors Insurance to public employees upon request of a State, unless such employees are covered by a pension or retirement "fund or system established by a State or by a political subdivision thereof." The question presented is the meaning of "established by a State or by a political subdivision thereof". Specifically, where a State requests insurance coverage for public employees who merely participate in a retirement system established, administered and controlled by a private insurance company, are such public employees excluded from insurance coverage?

2. When, in response to a request of a State for extension of Federal Old Age and Survivors Insurance to public employees of one of its political subdivisions who are covered by a private retirement system, the Federal Security Administrator rules that such employees are not entitled to coverage, is judicial review available on the merits to determine the correctness of the ruling by the Administrator on this matter of statutory interpretation?

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal by the Commonwealth of Kentucky, Ex Rel Department of Economic Security, City of Louisville Municipal Housing Commission, and Harold M. Booth from the order of the United States District Court

(Judge Holtzoff), entered on May 11, 1953, dismissing the Complaint. Each of these appellants has sued on its or his own behalf and on behalf of others similarly situated, this being a representative suit. By agreement of counsel for appellants and appellees, an order was entered (App. 46) by the District Court substituting Oveta Culp Hobby, Secretary of Health, Education and Welfare, as one of the defendants herein, in lieu of Oscar R. Ewing, Federal Security Administrator. It is recited in said order that the Secretary succeeded to the duties of the Federal Security Administrator and expressly assented to being substituted as such party defendant (App. 47). When the term "Federal Security Administrator" is used hereafter, it shall include the Secretary as his successor.

The opinion of the District Court dismissing the Complaint is not reported, a copy of the opinion being included in the Appendix (App. 44 et seq.).

The District Court had jurisdiction by reason of 5 U.S.C. 1009 (Act of June 11, 1946, ch. 324, Sec. 10, 60 Stat. 243), the Administrative Procedure Act, and 28 U.S.C. 2201 (Act of June 25, 1948, ch. 646, 62 Stat. 964, amended May 24, 1949, ch. 139, 63 Stat. 105), commonly known as the Federal Declaratory Judgment Act. The District Court's order was entered on May 11, 1953. The notice of appeal was filed on May 26, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1291 (Act of June 25, 1948, ch. 646, Sec. 1, 62 Stat. 929, amended Oct. 23, 1951, ch. 655, Sec. 48, 65 Stat. 726).

STATEMENT OF THE CASE

By amendments to the Social Security Act (hereafter "Social Security Act Amendments"), approved August 8, 1950, Congress provided for the extension of the Federal Old Age and Survivors Insurance System to cover certain employees of States and political subdivisions (42 U.S.C. 418; Act of Aug. 28, 1950, ch. 809, Title I, Sec. 106, 64 Stat.

514). To secure the extension of coverage of the Federal Old Age and Survivors Insurance System (hereafter "Federal Insurance System" or "Federal Insurance") to certain employees of the Commonwealth of Kentucky and its political subdivisions, the Legislature of the Commonwealth of Kentucky in its 1951 Extraordinary Session enacted the necessary State legislation, which was approved by the Governor on March 14, 1951 (Ch. 3, Kentucky Acts, Extra Session 1951).

The Social Security Act Amendments provide that the Administrator *shall*, at the request of any State, enter into an agreement with that State for the purpose of extending the Federal Insurance System to services performed by employees of that State or any political subdivision thereof (42 U.S.C. 418(a)(1)). As finally enacted, the Act included a committee amendment (hereafter the "Exclusion Amendment") to exclude from such coverage public employees in positions covered by a retirement system which had been established by a State or political subdivision thereof (42 U.S.C. 418(d) and 418(b)(4)).

Pursuant to the Social Security Act Amendments and the 1951 Kentucky enabling legislation, an agreement (hereafter "Federal-State Agreement") was entered into on April 27, 1951 between the Commonwealth of Kentucky (hereafter "the State") and the Federal Security Administrator (hereafter the "Administrator") providing for the extension of the Federal Insurance System to employees of the State (App. 30 et seq.). Between August 27, 1951 and April 23, 1952, eleven modification agreements were entered into between the Administrator and the State for the purpose of extending the Federal Insurance System to additional coverage groups comprising the employees of various political subdivisions of the State. Among these were the employees of four Housing Commissions located in four different cities in Kentucky, i.e. Covington, Frankfort, Newport and Owensboro (Modification Agreements Nos. 3 and 4 covering these employees

appear at App. 35 et seq., as part of the Federal-State Agreement which is Exhibit A attached to the Complaint).

On April 29, 1952, by letter (attached to the Complaint as Exhibit B) the State requested the Administrator to enter into a further Modification Agreement for the purpose of bringing under the Federal-State Agreement all the employees of the City of Louisville Municipal Housing Commission (hereafter the "Louisville Commission"), including those who were then covered by certain existing private retirement plans (App. 37 et seq.). In this request, the State made the required determinations, including the following:

(a) That it was authorized to modify the Federal-State Agreement to provide the requested coverage, and that the intent of the State and Federal laws was not to exclude from coverage employees of the Louisville Commission who were covered by retirement plans created and administered by private companies;

(b) That the Louisville Commission is an instrumentality of the State and accordingly a political subdivision thereof within the meaning of the applicable provisions of the State and Federal laws; and

(c) That the State had approved the plan and the requested modification of the Federal-State Agreement to extend the benefits of the Federal Insurance System to the employees of the Louisville Commission as being in conformity with the applicable provisions of the Social Security Act Amendments and its own State laws and regulations.

There had been a hearing in which appellants presented their case (involving arguments and briefs on the question of statutory construction) to appropriate officials designated by the Administrator. On June 4, 1953, the Administrator refused to enter into the requested modifica-

tion of the Federal-State Agreement, making a ruling (App. 39 et seq.) that the employees of the Louisville Commission covered by a private retirement system were not entitled to coverage under the Federal Insurance System. The ruling of the Administrator* was based upon his interpretation of provisions of the Exclusion Amendment.

On this motion to dismiss, the facts set forth in the Complaint concerning the retirement system (hereafter the "Association Retirement System") covering the employees of the Louisville Commission and the manner of its creation may be accepted as follows: (App. 17 et seq.):

(1) It is a private retirement plan administered by a private corporation known as the National Health and Welfare Retirement Association.

(2) The employees of the Louisville Commission merely acquired rights in an existing retirement system previously created by this private company.

(3) The retirement plan was not created by the Louisville Commission or the State or any political subdivision of the State, nor was it created by the exercise of legislative powers of the State or any of its political subdivisions. The Louisville Commission has no taxing or legislative powers, but is an incorporated public body with merely administrative powers covering certain designated public affairs and public purposes.

(4) Under this private retirement system, each employee who is a participant has an annuity contract with a private company entitling the participant to receive a yearly amount of annuity commencing on a certain date designated as the Normal Retirement Date; such retirement benefits are financed

* The ruling was actually signed by John L. Thurston, Acting Administrator of the Federal Security Agency, who is one of the party defendants and appellees in this case.

through premium payments made both by the employees and the employer.

(5) The constitution and by-laws of the National Health and Welfare Retirement Association state that the Association is organized for the purpose of providing pension benefits to employees who are members of the Association.

(6) Any employer eligible for membership in the Association may participate in the retirement program if the employer adopts and contributes to the plan and if at least 75% of its employees consent to participate.

(7) Following such action by the employer and its employees, every individual thereafter employed by the employer may participate in the retirement plan.

(8) The arrangement for these retirement benefits with a private company was consented and contributed to by the Louisville Commission under its administrative powers to compensate its employees.

(9) All matters relating to the administration of the System, including the payment of premiums, the conditions of eligibility and the payment of benefits are determined by the Association.

(10) The same Association Retirement System which covers the employees of the Louisville Commission also covers, with similar benefits and similar contracts, the employees of many private employers who, along with their employees, make premium payments to the Association; so that the Association Retirement System is not one which is limited to public employees, nor is it limited to any State or any political subdivisions of a State.

On June 9, 1952, the appellants filed a Complaint against the appellees (App. 2 et seq.) requesting that the Court enter a judgment declaring that the Exclusion Amendment does not apply to the employees of the Louisville Commission covered by the Association Retirement System and, accordingly, that the State is entitled to secure its requested modification in its Federal-State Agreement, in order to extend the benefits of Federal Insurance to such employees.

This is not a suit to collect money from the United States. The State merely asserts that the Louisville Commission and its employees have the right to pay social security taxes for remittance by the State to the Administrator and, in consideration thereof, to secure the benefits of Federal Insurance for such employees.

On August 13, 1952, the appellees made a motion to dismiss the Complaint (App. 42 et seq.). After oral argument, on May 11, 1953, the District Court entered an order dismissing the Complaint (App. 47 et seq.). The District Court rendered an opinion in connection with that order (App. 44 et seq.). This is an appeal from the order of the District Court dismissing the Complaint.

STATUTES INVOLVED

The Social Security Act Amendments involved are the amendments to the Social Security Act, approved August 28, 1950 (42 U.S.C. 418; Act of Aug. 28, 1950, Ch. 809, Title I, Sec. 106, 64 Stat. 514), the text of which is set out in the Complaint (App. 6 et seq.). The Exclusion Amendment therein appears in:

(1) Section 418(d) of 42 U.S.C. which reads as follows:

> "No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the

date such agreement is made applicable to such coverage group."

(2) Section 418(b)(4), which contains the definition of the term "retirement system", which reads as follows:

> "The term 'retirement system' means a pension, annuity, retirement, similar fund or system established by a State or by a political subdivision thereof."

STATEMENT OF POINTS

1. The District Court erred in failing to apply the Administrative Procedure Act, under which appellants are entitled to a judicial review on the merits and legal justification of the ruling by the Administrator on a matter of statutory interpretation, when the Administrator denied the right of the State to obtain a modification of its Federal-State Agreement for the extension of Federal Insurance coverage to employees of one of its political subdivisions covered by a private retirement system.

2. The District Court erred in denying relief to the appellants even on the basis of the criteria applicable to mandamus actions, since the Social Security Act Amendments are plain in imposing a ministerial duty on the Administrator, upon the request of the State, to extend Federal Insurance coverage to public employees covered by a private retirement system.

3. The District Court erred in not setting aside an administrative construction of the Exclusion Amendment that the words "fund or system established by a State or by a political subdivision thereof" includes retirement systems established, administered, and controlled by private insurance companies, rather than being restricted to public retirement systems established by a State or political subdivision.

4. The District Court erred in failing to interpret the Exclusion Amendment in accordance with the plain lan-

guage of the statute and well-established rules of statutory construction applicable to statutes of this character, since the effect of the interpretation denying Federal Insurance to public employees in private retirement systems is to give no meaning to the limiting words in the Exclusion Amendment and to produce unreasonable and discriminatory results.

5. The District Court erred in failing to interpret the Exclusion Amendment in accordance with the Congressional intention and purpose, as corroborated by the legislative history, that the Exclusion Amendment apply only to public employees under public retirement systems created by States or political subdivisions and not to those under private retirement systems.

SUMMARY OF ARGUMENT

When the Social Security Act Amendments provide for the extension of Federal Insurance to public employees upon the request of a State, unless such employees are covered by a pension or retirement fund or system established by a State or by a political subdivision thereof, the words "established by a State or by a political subdivision thereof" do not mean a retirement system established, administered, and controlled by a private insurance company. If it were intended to exclude all public employees who were in *any* retirement system—including both private and public retirement systems—which is the effect of the Administrator's ruling, these words quoted from the definition in the Exclusion Amendment would be surplusage.

These words were included to make it clear that the Exclusion Amendment would apply only to public employees in retirement systems administered and controlled by public officials, and limited to the public employees of that State or one or more of its political subdivisions. The Association Retirement System is clearly not such a re-

tirement system, as it was established and is administered and controlled by a private company, as a general plan which includes private employees and operates in all of the States and Canada.

The Administrator is not asserting any prohibition against public employees being covered by both the Federal Insurance System and another system, whether private or public, because many housing commissions and other political subdivisions have coverage under both systems (App. 25). This policy of allowing supplementary coverage by other non-Federal systems accords with the fact that the Federal Insurance System provides merely a floor of minimum benefits. The position of the Administrator (App. 24 et seq.) is, however, that if on the date of a modification of a Federal-State Agreement to extend the benefits of Federal Insurance, the employees of the Louisville Commission:

(1) are covered by a retirement system, even of the type involved in this case, such employees are denied Federal Insurance coverage;

(2) are not covered by such a retirement system (even though this occurs hereafter by the liquidation of the Association Retirement System, which would involve disadvantages and losses of vested rights), these employees may secure Federal Insurance coverage, and they may immediately thereafter superimpose the Association Retirement System to obtain supplementary benefits.

Under the Administrator's ruling that the employees of the Louisville Commission cannot be covered if they are in a private retirement system on a given day, the "given day" is not a date on or before the date of passage of the Social Security Act Amendments, but a designated date *after* the passage of the statute. It is not unusual for Congress to delegate whether certain laws shall, or shall not, be operative in a particular area, depending upon

future determinations of local or State legislative bodies. Such provisions are enacted by Congress in recognition of the fact that local or State legislative bodies consist of the elected representatives of the people and, accordingly, may properly speak for them. Thus, it is reasonable to construe the language to permit legislative bodies of a State, County or City to determine whether Social Security taxes and benefits should, or should not, be applicable to designated public employees. However, it is not reasonable to construe the language the way the Administrator does, which permits a non-legislative body to put itself and its employees out of reach of Social Security taxes and Federal Insurance coverage, after the passage of the Social Security Act Amendments.

The Administrator's interpretation results in unfair discriminations because it means that the Louisville Commission cannot obtain Federal Insurance for its employees, while the employees of other Housing Commissions in Kentucky have such coverage and may superimpose the Association Retirement System to secure supplementary coverage.

When the statute speaks of a retirement system "established" by a State or by a political subdivision thereof, the word "established" means creating something new and not acquiring rights under a retirement system which had already been brought into existence by a private company. The Exclusion Amendment therefore means to exclude only those public employees under a retirement system created by a State or a political subdivision itself.

The foregoing arguments in support of the interpretation of the statute urged by appellants are based on the plain meaning of the language of the Exclusion Amendment itself. The legislative history strongly supports this interpretation and confirms the Congressional intention that the exclusion from Federal Insurance applies only to those public employees under public retirement systems established by States or political subdivisions, and not to those under private retirement systems.

Each of the arguments for the appellants' interpretation of the Exclusion Amendment is developed hereafter under a separate point, as each by itself would support such an interpretation. Moreover, they provide cumulative support for the position of the appellants which should be upheld if the Court finds one or more of the points persuasive.

In deciding the issues involved in this case, the District Court should not have restricted itself to the narrow and rigid criteria it claimed were applicable to mandamus actions. The District Court failed to give any effect to the Administrative Procedure Act as the basis for granting relief. That Act is not subject to such limitations, but provides that the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions; also that it shall hold unlawful and set aside agency action found to be in excess of statutory authority or short of statutory right. As the Administrator proceeded contrary to the proper interpretation of the statute, this Court should review and set aside the statutory interpretation of the Administrator in order to protect the right of the State to secure Federal Insurance for public employees under private retirement systems.

Even on the basis of the criteria applicable to a mandamus action, the Administrator may be compelled by mandamus to perform the duty involved herein which is a ministerial one, plainly imposed by the Social Security Act Amendments. This Court and the Supreme Court of the United States have provided an effective judicial review on matters of statutory interpretation, and compelled by mandamus the performance of a duty required by the plain meaning of a statute, when the Court arrived at a different interpretation than the administrative officer.

Under the well-settled principles of statutory construction that statutes involving old age benefits should be broadly construed and exemptions narrowly restricted, the Social Security Act Amendments should be construed in a manner which would provide coverage to the Louisville Commission employees under private retirement plans and others similarly situated.

ARGUMENT

A. When the Exclusion Amendment denies Federal Insurance coverage to public employees who are covered by a retirement "fund or system established by a State or by a political subdivision thereof," the statute plainly means that such exclusion does not apply to employees covered by a retirement system established and administered by a private insurance company.

The Social Security Act Amendments provide (App. 6 et seq.) that the Administrator shall, at the request of any State, enter into an agreement with that State for the purpose of extending the Federal Insurance System to services performed by employees of that State or any political subdivision thereof (42 U.S.C. 418(a)(1)). The Exclusion Amendment provides that no such agreement may be made applicable to employees in positions covered by a retirement system on the date such agreement is made applicable to them (42 U.S.C. Sec. 418(d)). "Retirement system" as used in the Exclusion Amendment is a defined term. The definition applicable to this exclusion is "a pension, annuity, retirement or similar fund or system established by a State or by a political subdivision thereof" (42 U.S.C. 418(b)(4)).

Since we concede that the Louisville Commission is a political subdivision, the sole question for determination is what is meant by a "fund or system established by a State or by a political subdivision thereof." If it were intended to exclude all public employees who were in *any* retirement system—including systems not established by a State or political subdivision—these limiting words quoted from the definition in the Exclusion Amendment would be surplusage. There could be a period after the word "system", as the additional words would be wholly unnecessary and serve no purpose. However, this was not the intent.

These words were included in the definition to make it clear that the Exclusion Amendment would apply only to public employees in those retirement systems which were

established by a State or political subdivision. They mean that the fund or system is to be a public retirement fund or system, as distinguished from a private system. They mean that the retirement fund or system of a State or political subdivision is limited to that State or one or more of its political subdivisions, as distinguished from a general plan operating throughout the United States and Canada. They mean that the system is to be limited in its coverage to public employees, as distinguished from a system covering both public and private employees. They mean that the system is to be one which is administered and under the control and protection of public officials, as distinguished from a system administered and under the control of a private corporation.

We cannot assume that these limiting words were included in the statute without having any meaning or purpose. The Supreme Court of the United States emphasized this cardinal principle of statutory construction in *Market Co.* v. *Hoffman*, 101 U. S. 112, 25 L. Ed. 782. In construing an Act of Congress which provided that a market company chartered thereby was to sell the privilege of occupying stalls at public auction "for one or more years", the Supreme Court decided that the company could fix the number of years, but that the tenancy had to be for a fixed term and not one at will. In so ruling, the Court stated the following principles of statutory construction which are applicable to this case:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." (At page 115 of 101 U.S. 112.)

To read words out of a statute is to rewrite legislation and defeat its purpose. Yet the interpretation of the Administrator would give no practical effect to the limiting words in the Exclusion Amendment.

The Association Retirement System is clearly not a retirement system which was "established by a State or by a political subdivision thereof." This retirement system was established by a private insurance company, and is administered and controlled by that company. This retirement system is a general plan which includes private employees and operates in all of the States and Canada. The National Health and Welfare Association receives and invests the premiums required of employees and employers. It makes the payments of benefits in accordance with its annuity contracts with the covered employees and its constitution and by-laws.

The Administrator's argument is that the Louisville Commission, by availing itself of the Association Retirement System, has somehow caused that system to be established by the political subdivision. The only act of the Louisville Commission was to join this private retirement plan and pay the employer's share of the premiums, along with withholding and remitting the premium payments of the employees. Initially, at least 75% of the employees consented to participate in the private retirement plan and make their premium payments.

When a State or political subdivision joins a private retirement plan and makes matching contributions toward premiums, this obviously does not constitute the "establishment" of a retirement system by that State or political subdivision thereof. To so construe the statute is to make these words meaningless. It is a characteristic of retirement plans that there is a contribution by both the employer and the employee. This applies to public as well as private employers. The employer's contribution is recognized as a part of the compensation to the employee, so long as he works for the employer.

If each employee received his full compensation from the Louisville Commission (including the employer's contribution toward premiums, payable under the annuity contracts of the employees, which is a part of the employee's

compensation) and the employee paid the total premiums directly to the insurance company under his annuity contract, it would certainly be clear that a retirement system had not been established by a State or political subdivision within the meaning of the Exclusion Amendment. The fact that the Louisville Commission makes the deductions from the payrolls of the employees, adds its own matching contribution, and transmits such premium payments to the insurance company, is of no significance. When an employer makes payroll deductions on union employees and transmits them to the union, he can hardly be said to be establishing the union. Nor do payroll deductions for income and social security taxes mean that the employers are establishing such tax or social security systems. Likewise, payroll deductions by political subdivisions (and the payment of a matching insurance premium which represents compensation to the employee) for premium payments to a private insurance company do not mean that the political subdivision has established the pre-existing private retirement system.

The interpretation of the Administrator really amounts to nothing more than an assertion that employees of States or political subdivisions are excluded from Federal Insurance coverage if there is any retirement system applicable to such employees at the time prescribed by the statute. This interpretation gives no meaning to the qualifying words that the retirement system must be established by a State or by a political subdivision thereof. To give meaning to these words, it is necessary to restrict the Exclusion Amendment to retirement systems established by a State or a political subdivision thereof, and having the characteristics of public retirement plans.

B. To avoid unreasonable and discriminatory results, it is necessary to construe the Exclusion Amendment as not applying to public employees under private retirement systems.

The Administrator's position in this case is unduly narrow and technical. He has ruled that the employees of the Louisville Commission can be covered if they are not in a private retirement system on a given day. However, if they are in such a system on a given day, then they are not eligible unless they first liquidate that system.

The "given day" under this statute is not a date on or before the date of passage of the Social Security Act Amendments, but a designated date *after* the passage of the statute; to wit, the date when the State enters into a modification of the Federal-State Agreement covering the particular positions of the State or political subdivision involved.

The Exclusion Amendment must be given a fair and reasonable meaning in interpreting the language and ascertaining the purpose of Congress.

It is not unusual for Congress to delegate whether certain laws shall, or shall not, be operative in a particular area, depending upon future determinations of State or local legislative bodies. For example, under Federal statutes, the question whether Federal rent control would be operative in a particular area, depended on whether the State or local legislative body determined, by a certain future date, that there was a need for the continuance of rent control in that area. (50 U.S.C. 1894(j)(2) and (3); Act of March 30, 1949, Ch. 42, Title II, Sec. 203(h), 63 Stat. 21, as amended by Act of June 23, 1950, Ch. 354, Sec. 5, 64 Stat. 255, and by Act of December 20, 1950, Ch. 1139, Sec. 2, 64 Stat. 1113.) Such provisions are enacted by Congress in recognition of the fact that State or local legislative bodies consist of the elected representatives of the people and, accordingly, may properly speak for them. Congress would not delegate a determination of this kind to a non-legislative body.

Likewise, when Congress passes a law providing that, by Federal-State agreements, Federal Insurance may be extended to public employees who are not members of retirement systems at a future date, it is reasonable to construe the language as meaning a retirement system established by a legislative body of a State, County, or Municipality. Under such an interpretation Congress would be permitting legislative bodies to determine whether Social Security taxes and benefits should, or should not, be applicable to designated public employees. However, just as Congress did not delegate to any non-legislative body the power to determine whether rent control should be continued in an area, it is not reasonable to interpret the Exclusion Amendment as indicating an intention to permit non-legislative bodies (such as Housing Commissions) to put themselves and their employees out of reach of Social Security taxes and Federal Insurance coverage. Such an interpretation would mean that Housing Commissions or other non-legislative agencies could exempt themselves from a Federal statute by the simple device of joining private plans after the passage of the Social Security Act Amendments to extend the Federal Insurance System.

Other unreasonable and discriminatory results follow the Administrator's interpretation of the Act. For instance, the employees of the Housing Commissions in four other cities in Kentucky, who were not under the Association Retirement System at the time when the Federal-State Agreement was modified to cover them, are eligible for Federal Insurance. After joining the Federal Insurance System, they can immediately superimpose the Association Retirement System as a supplement to the Federal System (App. 25 and 26). In contrast, a similar Housing Commission in Louisville, which was under the Association Retirement System at the time that the State requested a modification in the Federal-State agreement to cover them, cannot get Federal Insurance at all, under the interpretation of the Administrator.

This is an unfair discrimination because it means that such a Housing Commission as Louisville can never get Federal Insurance for its employees, so long as it continues to have coverage for its employees under the Association Retirement System. It also means that an employee who has been working for one Housing Commission in Kentucky, which is covered by Federal Insurance, loses such insurance protection when that employee goes to work for the Louisville Commission.

Under his past rulings (App. 26), the Administrator would permit the employees of the Louisville Commission to obtain Federal Insurance coverage if they first liquidated their present retirement system, so that it would not be in effect on the day when the modification is made of the Federal-State Agreement, but such liquidation would involve great disadvantages to the employees of the Louisville Commission and loss of vested rights.

There would appear to be no reasonable justification for interpreting the statute in such a manner as to deny such Federal Insurance coverage to the employees of the Louisville Commission without this condition that they first suffer losses through liquidating their private retirement plan. As long as it is recognized that these employees may have the coverage of both Federal Insurance and the Association Retirement System, there is no reasonable basis for imposing the condition that the Association Retirement System must first be liquidated, when it can be immediately re-established and superimposed above the Federal Insurance System.

An interpretation of the statute which produces such discriminations and results is hardly reasonable. The acceptance of the appellants' position will avoid the unreasonable and discriminatory results of the contrary interpretation of the Administrator; also, it will help support the strong general policy of the statute to provide the broadest possible coverage.

C. In excluding from Federal Insurance public employees in a retirement system "established" by a State or political subdivision, the word "established" means creating something new and not acquiring rights under a retirement system which had already been brought into existence by a private company.

When the statute speaks of a retirement system "established" by a State or by a political subdivision thereof, the word "established" has a clear and well-defined meaning. The primary meaning of the word is stated in Corpus Juris Secundum as follows:

> "In its primary sense it has been defined as meaning to bring into being, create, or originate; to form, make, or model; to build or erect; to constitute; to found; to institute; to locate; to organize; to prepare; to set up; *but not acquire something which has already been brought into existence.*" (30 C.J.S. 1229, "Establish", italics added.)

The primary meaning of the word "establish" is the sense in which it was used in the Exclusion Amendment. In other contexts, the term "establish" has other broader meanings, but these are relevant, and are precedents, only with respect to those contexts and the broader sense in which the word is used in those contexts.

Thus, in *Dickey* v. *Maysville*, Wash., Paris and Lexington Turnpike Road Company, 37 Ky (Dana) 113, the United States Post Office made a contract with Dickey to carry mail from Maysville to Lexington, Kentucky and to use the turnpike between those places. It was claimed that the Post Office had thereby "established a post road" and that Dickey was permitted to carry the United States mail "toll free." The court held that by merely designating and adopting an existing road, the Government had not "established a post road" within the meaning of the United States Constitution. The court decided the word establish means to create and does not mean to adopt something pre-existing. It stated:

> ". . . the word 'establish' . . . must be understood to mean not merely to designate, but to create, erect, build, prepare, fix permanently. Thus, to establish a character, to establish oneself in business, to establish a school or manufactory, or government—all common and appropriate phrases—is not to assume or adopt some pre-existing character, or business, or school, or manufactory, or government. To establish, in each of those uses of the phrase, clearly expresses the idea of creating, preparing, founding, or building up."

In *Village of Villa Park* v. *Wanderers Rest Cemetery Company*, 147 N. E. 104, 316 Ill. 226, a Village ordinance prohibited the dedication or establishment of a cemetery within one mile of the corporate limits of the city. A cemetery had been previously dedicated and established and, as a result of subsequent annexation proceedings, it came within the one-mile radius. The Court held that the statute was not intended to apply to that cemetery since the meaning of the word "establish" was to create and regulate new cemeteries— not existing cemeteries.

In *Bogert* v. *City of Indianapolis* 13 Ind. 104 a city charter provided that the City Council should have power to establish cemeteries or burial places and provide for the sanctity of the dead. The Court held that the words meant that the City Council might acquire and improve land for a public cemetery, but that this language would not authorize the City Council to acquire existing private burial grounds and make them a public cemetery. In other words, to establish a public cemetery meant to create a new one, not acquire a private one.

In *State* v. *Board of Trust*, 129 Tenn. 279, 164 S. W. 1151, an act provided that whenever an educational institution "has been established" and is being maintained by any religious society or organization, that society or organization shall have the authority to elect its board of trustees. The Court, decided that to establish and to maintain an educational institution means to found and support it.

In *Ketchum* v. *City of Buffalo*, 14 N. Y. 356, the city, under its charter, had power "to establish and regulate markets." The Court said this implied power to purchase a site. It said "to establish" a market means to found it originally.

These cases are illustrative of the great body of decisions which hold that the word "establish" means to create something new, not acquire something in existence. The context in these cases all involved, as does the Exclusion Amendment, the primary use of the term, with a determination by the Court as between two clear alternatives which were applicable to the case—creating something new or acquiring something in existence. There is a vast body of similar authorities from which legal text writers have concluded that the primary meaning of the word is to create something new.

When the Exclusion Amendment refers to a retirement system established by a State or political subdivision, it is using the word "establish" in the same sense as establishing a post road, cemetery, business or utility. Accordingly, the word "establish" as used in the Exclusion Amendment means a new retirement system created by a State or its political subdivision, and does not mean contracting for participation with others in a retirement system previously created by a private company or contributing to the purchase by employees of annuity contracts with a private company.

D. The legislative history corroborates the Congressional intention that the exclusion from Federal Insurance applies only to those public employees under public retirement systems established by States or political subdivisions, and not to those under private retirement systems.

The foregoing points are based upon the language of the statute itself. They are not dependent upon the legislative history. They demonstate that the provisions of the Exclusion Amendment are clear in themselves in supporting the interpretation urged by appellants. It is not

surprising therefore to find that the legislative history on the Exclusion Amendment strongly supports this view.

The legislative history corroborates and emphasizes the Congressional intention not to deny Federal Insurance to public employees under private retirement systems of the character involved here, but only to deny such coverage to public employees under public retirement systems created by States or political subdivisions.

When the 1950 Social Security Bill was introduced, it contained provisions to make Federal Insurance available to public employees of a State and its political subdivisions, without exceptions, if the State requested an Agreement with the Administrator to extend such benefits to such employees.

After the bill was introduced, a number of organizations representing public retirement plans sponsored an amendment that no agreement with any State could be made applicable to employees of any State or political subdivision who, on the specified date, were covered by a retirement system established by the State or political subdivision. There were extensive Congressional hearings on the Exclusion Amendment which confirm the purpose and meaning of the language itself.

In making the Conference Report on the Social Security Act Amendments, Congressman Doughton, who was the Chairman of both the House Ways and Means and the House Conference Committees, made an explanation regarding the Exclusion Amendment which had been added by the Senate. He reported (App. 16 and 17) that this Exclusion Amendment which was accepted by the House Conferees—

> "excluded from the purview of such agreements, employees of State and local governments covered by State and local government retirement systems." (Conference Report on H. R. 6000 dated August 1, 1950, p. 100).

Thus, the House Committee Chairman was explaining that, as used in this Exclusion Amendment, the words "funds or systems established by a State or by political subdivisions there of" meant "state and local government retirement systems." This confirms the intention that public, and not private, retirement systems were contemplated by the Exclusion Amendment.

Where an amendment is sponsored by groups whose views and proposed amendment are accepted by a Congressional Committee, it is certainly relevant to consider the testimony of such witnesses as indicating the purpose of the amendment which they sponsored and which the Committee accepted. This type of case is entirely different from situations where witnesses merely appear to present their views on pending legislation, with no evidence as to whether a Committee accepts or rejects the views of the witnesses.

Senator George, Chairman of the Senate Finance Committee, acknowledged that the Exclusion Amendment was included because it was widely advocated before Congressional Committees by representatives of certain public employees. He stated:

> "Mr. President, I merely want to say that if there is any one question which was presented to the Senate Finance Committee with almost unanimity of view, sentiment and contention, it was this very question. The Committee was unanimously of the opinion that State police officers, firemen, and school teachers in the several States and municipalities ought not to be forced under the Federal Social Security system. This was the unanimous verdict of the Finance Committee after listening to testimony day after day from persons who had come from all parts of the country, from Maine to California." (App. 11)

In other words, the amendment was added to the Social Security Act Amendments because it was sponsored and supported by a large group of proponents.

At one point in the hearings, the Chairman of the Senate Finance Committee asked one of these proponents:

> "Let me ask you one question. As to the amendment which has been suggested, referring to the definition in subsection (b)(4) * * *. I suppose the definition as expanded by the amendment is broad enough to cover all of your systems?" (App. 16)

In response to this question, the witness, Mr. Goff (Chairman of the Committee of Associated Pension Funds of New Jersey) stated that:

> "the amendment will include all that we are asking exclusion for." (App. 16)

The testimony of this witness indicates that he was only asking for exclusion of those who are members of public retirement funds. He stated at one point:

> "* * * we do not oppose the extension of Social Security to those public employees who are not members of a public pension funds * * *" (App. 15)

We have filed as part of the Complaint in this case excerpts from the testimony of the proponents of the Exclusion Amendment. (App. 10 et seq.). These excerpts identify these proponents, what they urged, and the reasons given for their position. The salient points appearing from those excerpts may be briefly summarized, as follows:

First. From the hearings, it appears that the witnesses supporting this Exclusion Amendment represented public retirement plans established by lawmaking bodies. (App. 10) Thus, Senator Millikin, of the Senate Finance Committee, asked one of the proponents:

> "May I ask you please: What is the basis of your system? Do you have a code of law that regulates the system? Or is it by agreement of the members? Or just what is the legal basis of your system?" (App. 16)

To which the proponent replied that they—

> "... are provided by the legislature, by statutory acts." (App. 16)

Another proponent of the Exclusion Amendment, representing the Civil Service Forum of the State of New York, testified:

> "The Civil Service Forum of the State of New York and its component organization the Civil Service Forum of New York City, respectfully urge your support and favorable action for an amendment to H. R. 6000 to *exclude any State or political subdivision of any State which now maintain and operate a pension, annuity, or retirement system in accordance with State or local legislation.*" (App. 14)

Second. These proponents of the Exclusion Amendment urged that public employees who are members of public retirement systems be excluded from social security, but indicated that they did not oppose the extension of social security to public employees who were not members of public retirement systems. A typical statement on this point is that of (Robert J. Adams, Jr.) the Chairman of Legislative Committee, National Conference on Public Employee Retirement System, who represented 85 member organizations from 25 states comprising about 750,000 members. He stated:

> "... although we do not oppose the extension of social security to those public employees who are not members of a public retirement system, we are unalterably opposed to the extension of social security to public employees who are members of, or eligible for membership in, any State, County, or municipal retirement system ..." (House Hearings, p. 1942. See also his similar testimony in the Senate Hearings.) (App. 12)

To the same effect is the following statement of the Executive Vice-President and Treasurer of the Pensioners Protective Association of America:

> "Gentlemen, public employees do not wish to interpose any objection to the extension of social security coverage or benefits to those not so well covered and protected as they are under public retirement systems, but they most respectively (sic) pray and ask that they be excluded from coverage and permitted to remain undisturbed in their present contractual rights and expectations that they now enjoy and that they may continue to look forward to an age of retirement under a protected public retirement system." (App. 15)

Third. The reasons given by the proponents for their position of opposition to Federal Insurance coverage of employees are not applicable to employees of the Louisville Commission and other Housing Authorities. They feared that their State and local legislatures could not persuade the taxpayers to support two systems. The major fear was that there would have to be a choice between the two systems and that their more liberal public retirement systems would, therefore, be discontinued. In contrast, so far as the Louisville Commission and other Housing Authorities are concerned, there are no State or local legislatures involved and it has generally been contemplated that at such time as the Federal Insurance System became applicable to them, the Association Retirement System would be continued along with supplemental coverage under the Federal Insurance System.

Thus, the legislative history corroborates and supports the position of appellants as to the interpretation of the Exclusion Amendment based on the language itself. The intent and purpose of the Exclusion Amendment certainly was not to exclude from Federal Insurance the employees of the Louisville Commission under private retirement systems of the character represented by the Association Retirement System.

E. The District Court's recognition that the appellants' interpretation of the Exclusion Amendment was legally justifiable required the Court to accept that interpretation under the well-established principles of statutory construction that remedial statutes and those involving old age benefits should be broadly construed, with exemptions narrowly restricted.

The opinion of the District Court itself states at two points that it is legally possible to construe the Exclusion Amendment either in the manner it was interpreted by the Administrator or in the way urged by appellants (App. 44 and 45). We do not agree that the Administrator's interpretation can be justified legally.

However, since the Court recognized that the Exclusion Amendment could properly be construed in the manner proposed by appellants and since this would have extended the benefits of Federal Insurance, the Court should have accepted that interpretation rather than accepting the Administrator's interpretation which denied coverage to the Louisville Commission's employees and others similarly situated. In this way, the Court would have followed the well-established principle of statutory construction that the Social Security Act Amendments, being a statute which is remedial and which provides old age benefits, should be broadly construed to extend benefits rather than narrowly construed to restrict them.

Under well-settled principles of statutory construction, a remedial statute for humanitarian purposes must be broadly construed to extend its coverage and all exemptions therefrom must be narrowly interpreted so as to minimize exclusions. This principle has been consistently followed by the courts and the Supreme Court emphasized the rule in *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 65 S. C. 807. In that case the Court refused to extend the retail establishment exemption under the wage and hour law to warehouse and central office employees of a retail grocery store chain. The Court stated at page 493:

> "The Fair Labor Standards Act was designed "to extend the frontiers of social progress' by 'insuring to

> all our able-bodies working men and women a fair day's pay for a fair day's work'." Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."

This principle is applied in other fields of remedial legislation, particularly to interpretations of the scope and coverage of pension and retirement systems. Thus, McQuillan, *Municipal Corporations*, (3rd ed., 1949) Section 12.143, states:

> "Although the legislative intent, as evidenced by the provisions of the law and judicial construction thereof is controlling, pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby. If a provision is ambiguous and uncertain, the courts will consider the obvious purposes and objectives sought to be obtained and will construe the language used, insofar as it reasonably permits, to the end of giving it vitality and efficiency in the accomplishment of such purposes and objectives."

Over 50 cases are cited by McQuillan in support of this principle, that provisions purporting to circumscribe the scope, or limit the coverage, of a pension system are to be narrowly construed.

Congress has made clear its policy to provide coverage through the Federal Insurance System. Since this legislation is remedial in character and extends old age and pension benefits, the Exclusion Amendment should be strictly construed. Federal Insurance benefits should be withheld only from employees who are under a retirement system which is clearly within the purview of the Exclusion Amendment as being established by the State or

political subdivision as a public retirement system administered and controlled by public officials, and limited to public employees within that particular State or political subdivision. The Association Retirement System is not of this character, so the employees of the Louisville Commission (and others similarly situated) who are covered by this system should not be disqualified from Federal Insurance coverage.

F. The District Court erred in holding that appellants' right to relief is limited to the criteria applicable to mandamus actions. Under the Administrative Procedure Act, the Administrator's action denying Federal Insurance coverage is subject to judicial review to determine its correctness.

In deciding the issues involved in this case, the District Court should not have restricted itself to the criteria applicable to mandamus actions against Government officers. Under the Administrative Procedure Act, the Court should have granted relief on the merits and determined the correctness of the statutory interpretation by the Administrator, free from such narrow limitations on its judgment and review.

The District Court did not deny the requested relief on the basis of an evaluation of the merits. Indeed, the District Court was at pains to make clear that on the merits, the interpretation urged by appellants was at least as valid legally as that of the Administrator. The District Court failed to give any effect to the Administrative Procedure Act as the basis for granting relief, which is not subject to the limitations applicable to mandamus actions against individuals to compel their performance of ministerial duties in their government positions. Under the Administrative Procedure Act, this suit is against the United States, with its consent, and involves a judicial review to determine whether errors of law were committed, as this case involves solely questions of law.

Under Section 10 of the Administrative Procedure Act (Act of June 11, 1946, Ch. 324, Sec. 10, 60 Stat. 243; 5 U.S.C. 1009), any person, suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, is entitled to judicial review thereof.* The only exception in the application of this section is "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."* There are no provisions in the Social Security Act which preclude judicial review on the issues involved in this case. Moreover, the interpretation of the Exclusion Amendment is not a matter committed to agency discretion.

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* Section 10 of the Administrative Procedure Act (5 U.S.C. §1009) provides:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *"

"(e) So far as necesary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

In this case, a sovereign state is given certain rights by the Social Security Act Amendments and the Administrator is given certain duties to act, in recognition of those rights. When the State requests a modification of the Federal-State Agreement to secure Federal Insurance coverage for employees of the Louisville Commission, the Administrator has a ministerial duty to enter into such a modification (the statute reads that the Administrator "shall, at the request of the State, modify the Agreement") unless the requested modification would be inconsistent with the provisions of the Act. (42 U.S.C. 418(a)(1), App. 6 et seq). Upon a ruling by the Administrator that the State, as a party to the Federal-State Agreement, was not entitled to a modification thereof because of his interpretation of the language of the Federal statute, the State is certainly entitled to a judicial review to determine the correctness of this decision on the question of statutory construction.

The fact that the Administrator must read the Social Security Act Amendments and initially construe them does not vest him with any area of discretion. Thus, in *Fischer* v. *Haeherle*, 80 F. Supp. 652, from the District Court for the Eastern District of New York, twenty-eight war-time veterans working in a naval yard as civilian employees sued the officials in charge of the naval yard to enjoin their demotion on the ground that they were entitled to preference from competing non-veterans. The defendants moved to dismiss on the ground that the Veterans Preference Act did not provide for recourse to the courts and consequently the suit could not be maintained. The Court reviewed decisions of the United States Supreme Court and held that an administrative decision rejecting a claim on a pure question of law could be reviewed even in the absence of any express permission to sue, and that under the Administrative Procedure Act the right to review was expressly given except where the statute precluded the right or where the action

had been committed to agency discretion. The Court said that the Veterans Preference Act did not expressly preclude judicial review—"nor is the question of statutory construction one of administrative discretion."

The appellants suffered legal wrong and were adversely affected by the action of the Administrator in construing the Exclusion Amendment to deny Federal Insurance to the employees of the Louisville Commission covered by the Asociation Retirement System. Under Section 10(a) of the Administrative Procedure Act (5 U.S.C. 1009(a)), the appellants were therefore entitled to judicial review of this agency action. The Act defines agency action as including "the whole or part of every agency rule, order, license, sanction, relief or the equivalent, or denial thereof, or failure to act." (5 U.S.C. 1001(g).) These provisions apply to the Administrator's ruling denying the benefits of Federal Insurance, and since this agency action adversely affected and aggrieved the Appellants, judicial review is specifically available to them under Section 10(a) of the Administrative Procedure Act.

The availability of judicial review is further confirmed by Section 10(c) of the Administrative Procedure Act (5 U.S.C. 1009(c)) which provides that every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. If the interpretation of the District Court below is proper that the restricted nature of mandamus precludes judicial review on the merits to determine the correctness of a statutory interpretation, it is clear that a mandamus action does not provide an adequate remedy for judicial review on a question of statutory interpretation prescribing the duties of the Administrator to extend Federal Insurance on the request of a sovereign state. Section 10(c) specifically provides that review under the Administrative Procedure Act shall be available with respect to every final agency action (which would manifestly include denial of Federal Insurance as

here involved) for which there is no other adequate remedy in any court.

The availability of such judicial review of the action of the Administrator and the nature of the review provided by the courts is confirmed by the Courts. Thus, in *Unger* v. *U. S.*, 79 F. Supp. 281, (D.C. Ill.), a disabled war veteran applied to the Veterans Administration for a pension and for National Service Life Insurance. The Administrator held he was entitled to the pension but not the life insurance. The veteran then sued the United States for declaratory judgment as to his rights and the Government moved to dismiss the action on the ground the United States could not be sued without its consent. The Court said that if the statute with reference to insurance did not authorize the suit, it was nevertheless authorized by Section 10 of the Administrative Procedure Act. It said:

> "A literal reading of this section leads one to believe that judicial review is, by act of Congress, available in all cases except where statutes preclude judicial review, or where agency action is expressly left entirely to the Agency's discretion * * *. The legislative history convinces me that Congress thought they were doing more than codifying existing law."

It should be noted that the Unger case goes much further than the Court is asked to go in this case. There, the agency had passed on a question of fact as to the extent of the disability. Here, the agency has passed on a pure question of law as to the construction of the Social Security Act Amendments.

Since, as shown above, review is available to appellants here by reason of Section 10(a) and Section 10(c) of the Administrative Procedure Act, the next question is the scope of such review. This is covered by Section 10(e) of the statute (5 U.S.C. 1009(e)) which provides that, so far as necessary to decision—

> "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provis-

> ions, and determine the meaning or applicability of the terms of any agency action."

Not only is the reviewing court instructed to compel agency action unlawfully withheld or unreasonably delayed, but is specifically authorized to hold unlawful and set aside agency action found to be—

> "in excess of statutory jurisdiction, authority or limitations or short of statutory right."

In the instant case, the entire issue turns on the proper interpretation of statutory language. The Administrator's construction of the statute effectively denied Federal Insurance benefits to appellants. In taking this action, the Administrator proceeded contrary to the proper interpretation of the statute. Since, as indicated above, judicial review is available under the Administrative Procedure Act, it is clear that under Section 10(e) appellants are entitled to have the reviewing court determine the meaning of the statutory provisions involved. As aggrieved parties, the appellants are appealing from agency action and request, in the language of the statute, that the reviewing court decide questions of law and interpret statutory provisions.

This Court of Appeals recently determined that the Administrative Procedure Act was not intended to perpetuate pre-existing rigidities in extraordinary legal remedies, such as mandamus actions. These principles were announced in *Kristensen* v. *McGrath*, 179 F. 2d 796 (App. D. C.). In that case, a citizen of Denmark, who came to this country on a temporary visitor's visa and was unable to return because of the war, was served with a warrant of deportation, but later married an American citizen and applied for suspension of deportation under the Immigration Act. The suspension was denied on the ground he had been granted exemption from military service at the price of a perpetual bar to naturalization. He sued the Attorney General and the Commissioner of Immigration for a declara-

tory judgment and an injunction. The District Court denied relief. This Court reversed. It said that because of the Declaratory Judgment Act the plaintiff was not relegated to a habeas corpus action after arrest and that under Section 10 of the Administrative Procedure Act, the plaintiff was clearly entitled to a review of the administrative action. The Court reviewed the legislative history of the Administrative Procedure Act in view of the defendant's contention that it evidenced an intention to freeze the remedies previously used to test such agency's action, but the Court refused to accept that contention and held the suit could be maintained, stating:

> "We hold that the Administrative Procedure Act's judicial review section was not intended to perpetuate pre-existing rigidities in the use of extraordinary legal remedies but rather to simplify and make more flexible the avenues to judicial relief."*

In accordance with the specific authority granted by the Administrative Procedure Act, it is requested that this court review and set aside the statutory interpretation of the Administrator because such action denies appellants' rights to Federal Insurance clearly conferred by the Social Security Act Amendments. If the State is not entitled to a review on the merits of the Administrator's ruling in this case, then the Administrative Procedure Act would fail in its purpose of providing judicial reviews on administrative decisions where aggrieved persons have been denied rights to which they are entitled by law.

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* The case was affirmed in *McGrath* v. *Kristensen*, 340 U. S. 162, 71 S.C. 224, on the basis of the provisions of the Immigration Act, so the Supreme Court said it did not find it necessary to consider the applicability of the Administrative Procedure Act (p. 169).

G. The District Court erred in holding that the Administrator cannot be compelled by mandamus to perform the duty involved herein which is plainly imposed by the Social Security Act Amendments and is the equivalent of a positive command.

In its opinion, the District Court stated that this was not a suit against the United States, but an action for relief against the Government officer in the nature of a writ of mandamus, and, consequently, that the suit should be judged by those criteria that applied to mandamus actions. As indicated above, the appellants have a right to judicial review under the Administrative Procedure Act and the District Court erred in not granting such a review without the rigidities and limitations it asserted were applicable to mandamus actions.

Moreover, the Court also erred in the criteria it applied to this action as one in the nature of mandamus. It is true that the right of appellants to a judicial review in this case is not dependent solely on the application of the Administrative Procedure Act. Congress did not leave to the discretion of the Administrator a pure question of law such as the construction of the Social Security Act Amendments. The law is perfectly clear, and was before the Administrative Procedure Act was passed, that courts may review the action of an administrative officer where the issue is whether the administrative officer acted beyond or without statutory authority; also, that it is for the courts to determine the meaning of the statutes which impose duties upon administrative officers.

This is a case involving a ministerial duty. The Social Security Act Amendments place no discretion on the Administrator but impose a duty upon him to enter into a modification of a Federal-State Agreement when the State requests it for the purpose of extending Federal Insurance to employees of the State or the political subdivisions. The language of the statute is that the Administrator "shall" enter into such a modification agreement when requested

to do so by the State. (42 U.S.C. 418(a)(1); App. 6 et seq.) The question of which public employees were entitled to Federal Insurance coverage was exhaustively considered by the Congress, and Congress made all of the determinations relating to this matter. It did not grant any discretions to the Administrator. The determinations made by Congress were expressed in the Social Security Act Amendments.

Since the Administrator refused to enter into a modification agreement, when requested by the State to extend coverage to a group of employees who are entitled to secure such coverage, the Administrator acted beyond his statutory authority. Under such circumstances, the Administrator was not doing the business the sovereign empowered him to do, but on the contrary, was thwarting the will and decision of the sovereign. His actions were individual and not sovereign actions because they exceeded the limitations placed upon them by statute. Since his actions were ultra vires, relief may be granted to compel the performance of the duties imposed by statute which will carry out the will of the sovereign.

This principle that relief may be obtained where the actions of officers are beyond statutory limitations, so that they are considered as individual and not sovereign actions, has long been recognized and reaffirmed. This is one of the types of suits against administrative officers which do not invade the sovereign immunity and hence are cognizable by a Federal Court. Supporting this type of suit, where officers act beyond or without statutory authority, are the following cases: *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 23 S.C. 23; *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 32 S.C. 340; *Waite* v. *Macy*, 246 U. S. 606, 38 S.C. 395; *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228, 41 S.C. 314; *Santa Fe Pac. R. Co.* v. *Fall*, 259 U. S. 197, 42 S.C. 466; *Work* v. *Louisiana*, 269 U. S. 250, 46 S. C. 92; *Ickes* v. *Fox*, 300 U. S. 82, 57 S. C. 412; *Land* v. *Dollar*, 330 U. S. 731, 67 S. C. 1009.

Where, as here, the issue is one of statutory construction to ascertain the ministerial duties of the Administrator as to the group entitled to Federal Insurance, the courts have the responsibility to safeguard the rights conferred by the statute and not permit such rights to be denied without judicial review to determine the legal correctness of the administrative interpretation. The fact that the Administrator must read the law, in the first instance to determine his ministerial duty, does not vest the Administrator with any discretion to perform such duty or attach such compelling weight to his interpretation as to preclude effective judicial review.

A leading case on this subject is *Roberts* v. *United States,* 176 U. S. 221. In that case, a statute ordered the Treasurer of the United States to pay interest on certificates of claims issued by the Commissioners of the District of Columbia which he had redeemed. The certificates involved in that case had been sued upon in the Court of Claims and reduced to judgment. The judgments had been paid. The Treasurer refused to pay interest because, so he alleged, he had not redeemed these certificates. The Treasurer contended that a duty devolved upon him to interpret the meaning of the word "redeem" and thus there was left to him an area of discretion which could not be compelled by mandamus. The Supreme Court rejected this contention and held that under a proper construction of the statute the Treasurer had the duty to pay the interest. The Court said:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. *Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and*

> *in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.* Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, * * * ."

To like effect are: *Houston* v. *Ormes*, 252 U. S. 469, 40 S. C. 369; *Work* v. *McAlester*, 262 U. S. 200, 43 S. C. 580; *Wilbur* v. *Krushnic*, 280 U.S. 306, 50 S. C. 103; *Miguel* v. *McCarl*, 291 U. S. 442, 54 S. C. 465; and *United States ex rel. Welch* v. *Farley*, 92 F. 2d 533, 67 App. D. C. 382.

In *Miguel* v. *McCarl*, *supra*, the court likewise determined that the statute imposed a plain duty on the public officer and that there was no room for discretion. That case involved the interpretation of Federal Statutes to determine whether a native of the Philippine Islands who enlisted under a Federal Act of 1902 for "service in the Army" as a Philippine Scout became an "enlisted man in the Army" within the meaning of a Federal Act of 1907 so as to be eligible, after having served thirty years, to be placed on the retired list and receive retired pay and allowances. The Army disbursing officer submitted the voucher for the retired pay and allowances to the Comptroller General for "an advance decision as to the legal authority for payment." The Comptroller General rendered a decision that "the retirement of

enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws." Accordingly, the voucher was not paid and a mandamus action was brought to compel its payment. The Supreme Court held that the duty to pay the voucher was "so plainly prescribed as to be free from doubt and equivalent to a positive command" and that the duty was a ministerial one which may be compelled by mandamus. The significant feature of the case is that the administrative officers had felt the law was so clear that the Philippine Scouts were not entitled to retired pay even by the remotest implication of the law; yet the Supreme Court decided that the law "plainly directs that such an enlisted man, having served thirty years as such, shall be placed on the retired list."

This Court followed and relied upon *Miguel* v. *McCarl, supra,* in the case of *U. S. Ex Rel. Welch* v. *Farley, Postmaster General,* 92 F. 2d 533, 67 App. D. C. 382. In that case, this Court construed and reconciled two statutes so as to require the Postmaster General to grant a salary reclassification in accordance with the duty which this Court determined was plainly prescribed by statute, although the officials involved had ruled to the contrary. This Court decided that the Post Office Department had no discretion in the matter because the statute fixed the classification grades and how employees should progress from one grade to another. This Court stated that it was not the writ of mandamus issued by the District Court which commanded that employees be promoted:

> "but the Act of Congress which neither the Postmaster General nor this court is at liberty to ignore."

Contrary to the opinion of the District Court, *Hammond* v. *Hull,* 131 F. 2d 23, 76 App. D. C. 301, does not preclude effective judicial review of the Administrator's ruling in this case on a matter of statutory interpretation. The *Hammond* case involved an action for mandatory and injunctive relief by a foreign service officer to reverse an efficiency rating of "unsatisfactory". Obviously, assigning

an efficiency rating to a foreign service officer is very largely a matter of administrative discretion and judgment. The courts will not override such discretion in a mandamus action. Significantly, a question of statutory construction was involved in that case—whether the foreign service officer was entitled to reply to the proposed efficiency rating or to a hearing. This court independently reviewed the question of statutory construction and determined that the foreign service officer was not entitled to a hearing but only to reply. The reply had already been made, so the denial of mandamus was based upon the court's refusal to set aside discretionary action of an administrative officer on the efficiency rating. Significantly, the court pointed out that the administrative agency had conceded too much in terms of its statutory construction as to the rights of the foreign service officer to a hearing, so that the Court itself interpreted the statute rather than merely accepting the administrative construction.

In the many cases cited above, the Courts have provided an effective judicial review on the questions of statutory interpretation which were involved, and did not consider themselves bound by the statutory interpretations made by the administrative officers. Following an independent examination of the statutes the Courts have arrived at different interpretations than those reached by the administrative officials involved, and the right of the parties were determined on the basis of the judicial interpretations. Accordingly, the Courts compelled, by mandamus, the performance of the duties required by the plain meaning of the statute, as determined by the Courts.

CONCLUSION

Appellants respectfully request that the order of the District Court be reversed as erroneous; that this Court construe the provisions of the Social Security Act Amendments to carry out the meaning and intent of that law which was not to deny the request of a State for Federal Insur-

ance coverage of public employees who are under a retirement system established, administered and controlled by a private insurance company; and, accordingly, that the District Court be directed to enter a judgment declaring that the Exclusion Amendment does not apply to the employees of the Louisville Commission who are under the Association Retirement System and whose Federal Insurance coverage has been requested by the State.

The issue involved in this case is of major importance and public interest. In addition to the Commonwealth of Kentucky, twenty-three other States require amendments to their Federal-State Agreements to provide coverage for employees of Housing Authorities within their States, similarly situated to the Louisville Commission, who are presently covered by private retirement plans and being denied rights to Federal Insurance conferred by the Social Security Act Amendments.

Respectfully submitted

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11826

COMMONWEALTH OF KENTUCKY, EX REL DEPARTMENT OF ECONOMIC SECURITY, suing on behalf of itself and other States similarly situated, CITY OF LOUISVILLE MUNICIPAL HOUSING COMMISSION, suing on behalf of itself and other Low-Rent Public Housing Authorities similarly situated, and HAROLD M. BOOTH, an employee of the City of Louisville Municipal Housing Commission suing on behalf of himself and other employees of said Housing Commission and of other Low-Rent Public Housing Authorities similarly situated, *Appellants,*

v.

OVETA CULP HOBBY, Secretary of Health, Education and Welfare, and JOHN L. THURSTON, Acting Administrator of Federal Security Agency, and WILLIAM L. MITCHELL, Acting Commissioner of Social Security Administration, *Appellees.*

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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1 Filed June 9, 1952

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF KENTUCKY, EX REL DEPARTMENT OF ECONOMIC SECURITY, suing on behalf of itself and other States similarly situated, CITY OF LOUISVILLE MUNICIPAL HOUSING COMMISSION, suing on behalf of itself and other Low-Rent Public Housing Authorities similarly situated, and MARSHALL F. DUMEYER, an employee of the City of Louisville Municipal Housing Commission suing on behalf of himself and other employees of said Housing Commission and of other Low-Rent Public Housing Authorities similarly situated, *Complainants,*

vs.

OSCAR R. EWING, Administrator and JOHN L. THURSTON, Acting Administrator, of Federal Security Agency, and ARTHUR J. ALTMEYER, Commissioner of Social Security Administration, *Defendants.*

Declaratory Relief and Injunction Complaint

The complainants, the Commonwealth of Kentucky ex rel Department of Economic Security, Division of Personnel Security, City of Louisville Municipal Housing Commission (hereinafter called Housing Commission), and Marshall F. Dumeyer, an employee of the City of Louisville Municipal Housing Commission, state as follows:

1. The Commonwealth of Kentucky has entered into agreements (hereinafter called the "State-Federal Agreement") with the Federal Security Administrator acting through the Commissioner for Social Security for the purpose of extending the Federal Old Age and Survivors Insurance System established by the Social Security Act,

as amended, to the services performed by individuals as employees of the Commonwealth and certain of its political subdivisions; that among the employees of political subdivisions now covered by the State-Federal Agreement are those of several municipal housing commissions created by and pursuant to the laws of the Commonwealth of Kentucky (Chapter 80 Ky. Rev. Stat.) but not those of the City of Louisville Municipal Housing Commission; that, as hereinafter more fully set forth, the Commonwealth of Kentucky requested the Federal Security Administrator and the Commissioner of Social Security to enter into a modification of said State-Federal Agreement to include all the employees of the Housing Commission, but that the defendants have refused to enter into such a modification of the State-Federal Agreement. The official residence of the Commonwealth of Kentucky is in the City of Frankfort, Commonwealth of Kentucky.

2. That the relator herin is a branch of the Executive Department of the Government of the Commonwealth of Kentucky and that by Senate Bill No. 1, 1951 Extraordinary Session of the General Assembly of the Commonwealth of Kentucky the Department of Economic Security (the Division of Personnel Security being a part thereof) was authorized, on behalf of the Commonwealth of Kentucky, to enter into agreements with the Federal Se-
2 curity Administration for the purpose of extending the benefits of the Federal Old Age and Survivors Insurance System to employees of the Commonwealth of Kentucky and political subdivisions thereof and to handle various matters involved in the administration or supervision of said Old Age and Survivors Insurance System on behalf of the Commonwealth and its political subdivisions.

3. The Housing Commission is, and at all the times hereinafter mentioned was a public body corporate created by and pursuant to the laws of the Commonwealth of Ken-

tucky (Chapter 80 Kentucky Rev. Stat.) and pursuant to a general ordinance of the City of Louisville adopted January 4, 1937 and the appointment of Commissioners to said Housing Commission by the Mayor of the City of Louisville; and that the Housing Commission is vested by said statutes of the Commonwealth of Kentucky with administrative powers to carry out the public purpose of undertaking, constructing, financing and managing projects to clear slums and to provide low-rent public housing for persons who lack the amount of income necessary to enable them, without financial assistance, to obtain such housing. The official residence of said Housing Commission is in the City of Louisville, Commonwealth of Kentucky and the residence of complainant, Marshall F. Dumeyer, an employee of said Housing Commission, is the City of Louisville, Kentucky.

4. The defendant, Oscar R. Ewing, is the Administrator of the Federal Security Agency under the Federal Social Security Act, which Federal Security Agency is an agency and instrumentality of the United States, and said defendant has his official residence in the City of Washington in the District of Columbia. The defendant, John L. Thurston, is the Acting Administrator of the Federal Security Agency during periods when the Administrator is absent, and said defendant has his official residence in the City of Washington, in the District of Columbia. The defendant, Arthur J. Altmeyer, is the Commissioner of the Social Security Administration, being a division of the Federal Security Agency under the Social Security Act, and said defendant also has his official residence in said City.

5. This is a civil action for declaratory, injunctive and mandatory relief under the Declaratory Judgment Act, the Federal Administrative Procedures Act and other applicable laws and authorities. The matters involved in this proceeding arise under the Constitution and laws of the United States. The matters in controversy herein exceed

the sum or value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

6. There are approximately 23 other states similarly situated as the Commonwealth of Kentucky who require amendments to, or provisions in, their State-Federal Agreements in order to provide coverage for employees of Housing Authorities within such States who are similarly situated as the complainant, City of Louisville Municipal Housing Commission. Such other States constitute a class and are so numerous as to make it impracticable to bring all of them before the Court and the Commonwealth of Kentucky, one of the complainants herein, sues herein for itself and for all other members of said class.

7. There are approximately eighty (80) other housing commissions or authorities similarly situated (herein called "Housing Authorities") as the Housing Commission, which have approximately 5,500 employees and which have the same controversy as does the complainant, with the defendant, as more fully hereinafter set out. Such other Housing Authorities are located in various States throughout the country having similar rights and powers under State laws and court decisions and having similar coverage of their employees by private retirement plans. Such other Housing Authorities constitute a class and are so numerous as to make it impracticable to bring all of them before the Court, and the Housing Commission, one of the complainants herein, sues herein for itself and for all other members of the said class.

8. There are approximately 5,500 employees of the Housing Commission and Housing Authorities who are similarly situated (herein called employees of the Housing Commission and Housing Authorities) as Marshall F. Dumeyer, one of the complainants herein, and which have the same controversy as does said complainant, with the defendants, as more fully hereinafter set forth. Such other employees of the Housing Commission and Housing

Authorities are located in various States and constitute a class and are so numerous as to make it impracticable to bring all of them before the Court, and said Marshall F. Dumeyer, one of the complainants herein, sues herein for himself and for all other members of the said class.

9. By amendments to the Social Security Act, approved August 28, 1950 (49 Stat. 620, 42 U.S.C. Sec. 418), Congress provided for the extension of the Federal Old Age and Survivors Insurance System to cover certain employees of States and political subdivisions. These amendments to the Social Security Act provide in part, as follows (underscoring is added and does not appear in actual text; and also numberings are those appearing in 42 U.S.C.):

§ 418. Voluntary agreements for coverage of State and local employees—(a) Purpose of agreememnt.

(1) The Administrator shall, at the request of any State, enter into an agreemen with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this Section, as the State may request.

(2) Notwithstanding section 410 (a) of this title, for the purposes of this subchapter the term 'employment' includes any service included under an agreement entered into under this section.

"(b) Definitions.

For the purpose of this section—

(1) The term 'State' does not include the District of Columbia.

(2) The term 'political subdivision' includes an instrumentality of (A) a State, (B) one or more political

subdivisions of a State, or (C) a State and one or more of its political subdivisions.

(3) The term 'employee' includes an officer of a State or political subdivision.

(4) *The term 'retirement system' means a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof.*

(5) The term "coverage group" means (A) employees of the State other than those engaged in performing service in connection with a proprietary function; (B) employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function; (C) employees of a State engaged in performing service in connection with a single proprietary function; or (D) employees of a political subdivision of a State engaged in performing service in connection with a single proprietary function. If under the preceding sentence an employee would be included in more than one coverage group by reason of the fact that he performs service in connection with two or more proprietary functions or in connection with both a proprietary function and a nonproprietary function, he shall be included in only one such coverage group. The determination of the coverage group in which such employee shall be included shall be made in such manner as may be specified in the agreement.

"(c) Services Covered.

(1) An agreement under this section shall be applicable to any one or more coverage groups designated by the State.

(2) In the case of each coverage group to which the agreement applies, the agreement must include all services (other than services excluded by or pursuant to subsection (d) or paragraphs (3), (5), or (6) of this subsection) performed by individuals as members of such group.

(3) Such agreement shall, if the State requests it, exclude (in the case of any coverage group) any services of an emergency nature or all services in any class or classes of elective positions, part-time positions, or positions the compenation for which is on a fee basis.

(4) The Administrator shall, at the request of any State, modify the agreement with such State so as to (A) include any coverage group to which the agreement did not previously apply, or (B) include, in the case of any coverage group to which the agreement applies, services previously excluded from the agreement; but the agreement as so modified may not be inconsistent with the provisions of this section applicable in the case of an original agreement with a State.

(5) Such agreement shall, if the State requests it, exclude (in the case of any coverage group) any agricultural labor, or service performed by a student, designated by the State. This paragraph shall apply only with respect to service which is excluded from employment by any provision of section 410 (a) of this title other than paragraph (8) of such section.

(6) Such agreement shall exclude—

(A) service performed by an individual who is employed to relieve him from unemployment.

(B) service performed in a hospital, home, or other institution by a patient or inmate thereof.

(C) covered transportation service (as determined under section 410 (1) of this title), and

(D) service (other than agricultural labor or service performed by a student) which is excluded from employment by any provision of section 410 (a) of this title other than paragraph (8) of such section.

"(d) Exclusion of positions covered by retirement systems.

No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group."

The other provisions of the aforesaid amendments to the Social Security Act deal with: payments and reports by states (e); effiective date of agreement (f); termination of agreement (g); deposits in trust funds and adjustments (h); regulations (i); failure to make payments (j); instrumentalities in two or more states (k); and delegation of functions (l).

10. The complainants state that under the language of the aforesaid Section 418 (d) and 418 (b) (4) of the Social Security Act, as amended, employees are only excluded from the Federal Old Age and Survivors Insurance System if they are covered by a system created as a public retirement system by a State or political subdivision thereof through customary legislative action of its governing body. The defendants assert that the language should be interpreted as excluding from the Federal Old Age and Survivors Insurance System all public employees covered by any retirement system, including systems created and administered by private organizations where benefits are made available through annuity contracts to both private and public employees upon premium payments by such employees and their employers. While complainants state that the aforesaid provisions of the Social Security Act are clear in themselves in supporting the complainants' interpretation, the defendants' different interpretation makes it appropriate to obtain the assistance of the legislative history of these provisions in ascertaining their meaning and purpose and in resolving any possible am-

biguity therein. The interpretation asserted by the complainants is corroborated by the legislative history. At the hearings before the House Ways and Means Committee and the Senate Finance Committee, during the proceedings before the Senate, and in the report of the Conference Committee to the House on the consideration of the amendmnts to the Social Security Act approved August 28, 1950, with respect of the amendment to Section 418, referred to above, it clearly appears that the purpose and contemplated meaning of these amendments was to exclude from the Federal Old Age and Survivor Insurance System only the employees of any coverage group in positions covered by public retirement systems established by a State, City or other political subdivision through customary legislative actions of their governing bodies.

For the applicable Congressional hearings and proceedings cited below (underscoring is added and does not appear in the actual text), see: "Hearings before the Committee on Ways and Means, House of Representatives, 81st Congress, First Session on H.R. 2893" (hereinafter called "House Hearings"); "Hearings before the Committee on Finance, United States Senate, 81st Congress, 2nd Session on H.R. 6000" (which was Committee substitute for H.R. 2893, such Hearings being hereinafter called "Senate Hearings"); and Congressional Record, 81st Congress, 2nd Session, Tuesday, June 20, 1950.

At these Committee hearings, various representatives of policemen, firemen, elementary and secondary school teachers, and certain other public employees urged the adoption of an exclusion amendment under which Federal Old Age and Survivor Insurance benefits would be denied to their groups who had public retirement plans established by legislative acts or municipal ordinances. From the hearings, it appears that all the witnesses supporting this exclusion amendment represented public retirement plans established by law-making bodies. There does not appear to have been any witness supporting the exclusion amend-

ment who indicated to the Congressional Committees that he was representing a retirement plan created by a private agency or insurance company which covered both public employees and private employees.

These representatives of public retirement plans established by state or local laws indicated as a major reason for their desiring exclusion from the Federal system their doubt that the legislative bodies which had established their systems would be able to persuade the taxpayers to pay for both systems; and that the Social Security Act would, therefore, have the effect of destroying their public retirement systems which provided greater benefits than the Federal System. Such representatives did not oppose the extension of the Federal System to other public employees not eligible for benefits under their public retirement systems.

The effect of this testimony was acknowledged before the Senate by Senator George, Chairman of the State Finance Committee, who stated (Congressional Record, June 20, 1950, p. 9022):

> "Mr. President, I merely want to say that if there is any one question which was presented to the Senate Finance Committee with almost unanimity of view, sentiment, and contention it was this very question. The committee was unanimously of the opinion that State police officers, firemen, and school teachers in the several States and municipalities ought not to be forced under the Federal social-security system. This was the unanimous verdict of the Finance Committee after listening to testimony day after day from persons who had come from all parts of the country, from Maine to California."

Thus, the testimony referred to included the following statement by Robert J. Adams, Jr., Chairman of Legislative Committee National Conference on Public Employee Retirement System, who represented 85 member organiza-

tions from twenty-five (25) states comprising about 750,000 members:

> "* * * States have rapidly been setting the plans up on a State-wide basis * * *. There are now 30 State-wide systems * * *. In addition to these State-wide systems for State employees there are State-wide retirement systems for teachers in every State of the Union, as well as many local systems for local employees in hundreds of cities and other political subdivisions. * * *
>
> * * * *although we do not oppose the extension of social security to those public employees who are not members of a public retirement system,* we are unalterably opposed to the extension of social security to public employees who are members of, or eligible for membership in, any State, County, or municipal retirement system * * *"

7 "To include such public employees inevitably would lead to the destruction of their own local systems, because the local taxpayer will not support both; nor is it reasonable to expect him to do so. By the same token, the superimposing of social security upon retirement plans would impose a double burden of contributions upon the oftentimes underpaid public employee." House Hearing, p. 1942).

See also his similar testimony in the Senate Hearing, where Mr. Adams made it clear that his group and the others testifying for similar groups were requesting only the exclusion of public retirement systems established by legislative act, and that they wanted the same exclusion as Federal employees who are excluded when covered by a retirement system established by law:

> "Frankly, the more than a million public employees protesting against the bill in its present form *cannot*

understand the insistence that they be treated differently from the Federal workers. * * *"

"Another objection, in principle, to social-security coverage is that conditions of public employment vary greatly in the States and subdivisions thereof. Existing pension and annuity systems are planned to meet State and local needs. When changes become desirable, they can be sought and made at State and local levels. * * *"

"To summarize: We present here today a plea endorsed by considerably more than a million public employees covered in their own satisfactory retirement systems *to be given the same exclusion from any possibility of social security that is given the Federal employee.* For reasons cited and others, we do not wish to rely upon the referendum provision for protection, any more than does the Federal employee. We believe that we have studied this problem long enough (since Senator Wagner's first bill) to have the basis for an intelligent decision as to our needs and wishes. We have listened year after year to speeches from social security administration representatives, and still remain unconvinced that we wish to accept their recommendations. We seriously doubt the likelihood that any *municipal council or State legislature would be able to persuade the taxpayers to pay for both systems in full.* Inevitably our existing system would suffer. To integrate the two systems, which the proponents say would be easy, is denied by actuaries who have spoken at our meetings. * * *"

"We respectfully, therefore, urge the committee to accept the amendment we request, in order that we may tell our fellow retirement systems members that you have maintained the status quo, and that it will continue to be impossible to place us under social security." (Senate Hearings, p. 843)

Eugene J. Byrne testified as Legislative Chairman of the Civil Service Forum, City of New York, New York, N. Y.:

> "The Civil Service Forum of the State of New York and its component organization the Civil Service Forum of New York City, respectfully urge your support and favorable action for an amendment to H.R. 6000 to *exclude any State or political subdivision of any State which now maintain and operate a pension, annuity, or retirement system in accordance with State or local legislation.*" (Senate Hearings, page 984).

George F. Mulligan, Jr., member of a retirement system of the City of Chicago was speaking on behalf of 91,000 participants covered by 16 different public employee annuity and benefit funds in that area:

> "*The funds constitute* an essential adjunct of a sound and realistic policy in public administration in Illinois and have become established as *an integral part of local government in our State.* * * * *the local governmental units having sanctioned the creation of the local pension funds in former years,* and having assumed liabilities under these funds, might view this legislation as an opportunity to shift the obligation from the local to the Federal government. * * *" (Senate Hearings, Part 2, page 984).

Lewis H. Fisher, First Vice President and General Counsel of the National Association of Retired Civil Employees:

> "Our organization is cooperating with the National Conference on Public Employee Retirement Systems, the Joint Committee of Public Employment Retirement Systems, the National Education Association, as well as with policemen, firemen, and other public employee groups in opposition to social-security coverage for public employees. Generally speaking we concur in the recommendations made by the represent-

atives of the foregoing groups before this Committee during the week of February 7 to 10, 1950.

* * * Simply stated *our objection is based on the fact that the public retirement systems are generally superior to the benefits of the purely social system.*" (Senate Hearings, p. 2051).

Albert J. E. McLaughlin, Executive Vice President and Treasurer of The Pensioners Protective Association of America, Inc., which Association is affiliated with 312 national, federal, state, county, city and municipal employee-workers, etc. existing in thirty-one (31) States, testified:

"Gentlemen, public employees *do not wish to interpose any objection to the extension of social security coverage or benefits to those not so well covered and protected as they are under public retirement systems,* but they most respectively pray and ask that they be excluded from coverage and be permitted to remain undisturbed in their present contractual rights and expectations that they now enjoy and that they *may continue to look forward to an age of retirement under a protected public retirement system.*" (House Hearings, 2150; see also Senate Hearings, pages 923-5).

In the testimony of John J. Goff, Chairman of Committee of Associated Pension Funds of New Jersey, who spoke for approximately 50,000 employees in New Jersey (Senate Hearings, p. 897; see also Mr. Goff's similar testimony in the House Hearings, p. 1945 et seq.), there are the following statements and exchanges with Committee Members:

"*Most public employees in New Jersey are now covered by retirement funds established by state authority.* * * * *Although we do not oppose the extension of social security to these public employees who are not members of public pension funds, we are unalterably opposed to the extension of social security to public*

employees who are members of and eligible for membership in any state, county or municipal pension or retirement system.''

* * *

"Senator Millikin—May I ask you please: *What is the basis of your system? Do you have a code of law that regulates the system? Or is it by agreement of the members?* Or just what is the legal basis of your system?

9 "Mr. Goff—*Our statutes all, Senator, are provided by the legislature, by statutory acts.''*

* * *

"The Chairman. Let me ask you one question. *As to the amendment which has been suggested,* referring to the definition in subsection (b) (4) * * *. *I suppose the definition as expanded by the amendment is broad enough to cover all of your systems.*

Mr. Goff—*The amendment will include all that we are asking for.''*

Numerous other witnesses for public retirement systems testified to the same effect. They all favored the same suggested exclusion amendment and practically all of them expressed the fear that if the bill was not amended their public retirement systems would be endangered of being modified or repealed by State or local legislation of the State, City or other political subdivisions which established the system. The amendment they proposed was to the same effect as Section 418 (d) (42 U.S.C.), of the Social Security Act as finally passed, including the definition contained in Section 418 (b) (4).

In reporting to the House, the Conference Report on the bill as passed by the Senate, Mr. Doughton, Chairman of the House Ways and Means Committee and of the House Conference Committee, reported:

> "The House bill provided for the extension of Old-Age and Survivors Insurance coverage to employees of State and local governments under agreements negotiated between the States and the Federal Security Administration. The House bill also permitted the employees of State and local governments covered by State or local government retirement systems, to be included in such agreements if two-thirds of the employees consented to be covered under the program. *The Senate amendment modified the House provisions. It excluded from the purview of such agreements employees of States and local governments covered by State and local government retirement systems.* The Senate amendment further provided for the establishment of separate coverage groups of employees engaged in the performance of single proprietary functions. *The Conference agreement adopts the Senate provisions.*" (Conference Report on H.R. 6000, dated August 1, 1950, p. 100).

The above quotations and numerous other similar testimony before the Senate and House Committees, and the proceedings in the Senate and in the Conference Report, demonstrate beyond question that the purpose and meaning of the aforesaid provision was to exclude from Social Security old-age benefits only those employees of State and political subdivisions covered by public retirement systems which were established by a State, City or other political subdivision through customary legislative actions of their respective governing bodies.

11. At the time of the amendment to the Social Security Act of August 28, 1950 and on the date the respective agreements between the States and the Federal Security Agency were made applicable to them, the employees of the Housing Commission and Housing Authorities had contracts with private insurance companies providing for pensions, annuities, or retirement benefits. Such retire-

ment plans were not established or administered by the States or any political subdivisions thereof, but were established and administered by private insurance companies. Such arrangements with private insurance companies were made by private contract with private insurance companies and were consented and contributed to by the Housing Commission and Housing Authorities under their administrative powers to compensate their employees. Under these private retirement systems, each employee who is a participant therein has an annuity contract with the private company entitling such participant to receive a yearly amount of annuity commencing on a certain date designated in the contract as the Normal Retirement Date. These private retirement plans covering such employees make benefits available by such contracts to both private and public employees upon premium payments by both employees and their employers.

12. From the above quoted language of the Social Security Act and its legislative history, it is clear the only kind of retirement system contemplated by that Act whose coverage would exclude employees of States and political subdivisions would be:

a. One actually created by a State or political subdivision, since "established by" means "created by", rather than acquiring something which already exists merely by purchasing insurance policies or making contracts for participation in a plan set up by someone rather than a State or political subdivision.

b. One which is a public retirement plan administered by a public agency, rather than a private retirement plan administered by private agencies or insurance companies.

c. A retirement plan created by a State or political subdivision through customary legislative actions of their respective governing bodies. Since States and political subdivisions can only "establish" retirement

systems by legislative acts or ordinances, the type of retirement plans contemplated by the statute includes only those created by such legislative actions. As hereinabove indicated, the aforesaid exclusion amendment to the Social Security Act was enacted in response to groups who opposed the extension of a Federal Old Age and Survivor Insurance Plan to public employees who were members of State, County, or municipal retirement systems covering policemen, firemen, elementary and secondary school teachers and certain other public employees; such public retirement systems having been established by legislative action of the State legislature or governing bodies of counties or municipalities .

13. The retirement plans covering employees of the Housing Commission and Housing Authorities are not of the character contemplated by this exclusion in the Social Security Act, since these plans:

a. Were not "created" by the Housing Commission or Housing Authorities or any other political subdivision of a State or a State. The employees of said Housing Commission and Housing Authorities merely acquired rights in existing systems previously created by private insurance companies or agencies.

b. Are not public retirement plans which are administered by public agencies, but are private plans administered by private agencies or insurance companies.

11 c. Were not created by the exercise of legislative powers of a State or political subdivision thereof. The Housing Commission and Housing Authorities have no taxing or legislative powers, but are public bodies corporate with administrative powers covering certain designated public affairs and public purposes. The Court of Appeals of Kentucky has specifically determined that the Housing Commission is

not vested with legislative power and that its powers are purely administrative. Similar decisions have been rendered as to Housing Authorities by the highest courts of other States. Retirement plans which had been established by private agencies or insurance companies became applicable to employees of the Housing Commission and Housing Authorities as a result of private contracts with these private agencies or insurance companies. Benefits under these private plans were available to both public and private employees where such employees and their employers jointly make premium payments.

14. The Commonwealth of Kentucky, and most of the other states in which the Housing Authorities respectively are located, have entered into agreements with the Federal Security Administrator, or have agreements under negotiation or have legislation pending, to authorize the entering into of such agreements, for the purpose of extending the benefit of the Federal Old Age and Survivors Insurance System to those employees of such States and political subdivisions and instrumentalities thereof, who are described in the appendices attached to such agreements, either initially or by modification thereof. A copy of the State-Federal Agreement entered into by the Commonwealth of Kentucky with the Federal Security Administrator, which is similar to the agreements entered into with other States, is filed herewith as part hereof marked Exhibit "A", including the various modifications therein from time to time.

15. By letter dated April 29, 1952, a copy of which is attached hereto as Exhibit "B", the Commonwealth of Kentucky acting through the Department of Economic Security and its Division of Personnel Security requested the defendants to indicate their willingness to enter into a modification of its State-Federal Agreement for the purpose of bringing thereunder all of the employees of the

City of Louisville Municipal Housing Commission, including any such employees who were then covered by the private retirement plans hereinabove described. The request of the Commonwealth of Kentucky for said modification in the State-Federal Agreement was made upon the express condition that it was not to be amended to cover the aforesaid Housing Commission and its employees unless the amendment would cover all the employees of the said Housing Commission, including those under the aforesaid private retirement plans. In connection with this request, the Commonwealth of Kentucky acting through the Department of Economic Security and its Division of Personnel Security made all of the required determinations, including determinations that:

(a) it was authorized to modify the State-Federal Agreement to provide the requested coverage, and that the intent of the State law and the aforesaid provisions of the Social Security Act, as amended, was to exclude from coverage by state-federal agreements only employees covered by public retirement plans established by the State or political subdivisions, and not to exclude employees of said Housing Commission who were covered by retirement plans created and administered by private companies or employees who are participants in annuity contracts entitling such a participant to receive a yearly amount of annuity commencing on a designated retirement date;

12 (b) said Housing Commission is an instrumentality of the Commonwealth of Kentucky and, accordingly, a political subdivision of the Commonwealth of Kentucky within the meaning of applicable provisions of the State Law and the aforesaid provisions of the Social Security Act, as amended; and

(c) the Commonwealth of Kentucky acting through the Department of Economic Security and its Division of Personnel Security had approved the plan and the

requested modification of the State-Federal Agreement to extend the benefits of the Federal Old Age and Survivor Insurance System under the Social Security Act to all of the aforesaid employees of said Housing Commission as being in conformity with the applicable provisions of the Social Security Act and the applicable provisions of its State laws and regulations.

16. On the 4th day of June, 1952, the defendants refused to enter into the requested modification of the State-Federal Agreement making a ruling that the employees of the Housing Commission covered by the aforesaid private retirement plans were not entitled to coverage under the Federal Old Age and Survivor Insurance System under the Social Security Act through a modification of the State-Federal Agreement as requested. Attached hereto as Exhibit "C" is a copy of said ruling of the defendants. In refusing to modify the State-Federal Agreement as requested and in ruling that the employees of said Housing Commission covered by private retirement plans are excluded from such coverage, the defendants have acted in an unlawful and arbitrary manner and are denying coverage to a group who were intended to be covered by the aforesaid provisions of the Social Security Act, as amended.

17. The other complainants and those for whose benefit this suit is brought also have made demands upon the defendants that Federal Old Age and Survivors Insurance coverage under the Social Security Act, as amended, be extended to employees of the Housing Commission and Housing Authorities. The defendants have unlawfully and arbitrarliy refused to grant such coverage on the ground that the Housing Commission and Housing Authorities have a retirement plan, even though that plan is one which was created and administered by private insurance agencies and companies, as aforesaid. The defendants have ruled that the following types of service are ex-

cluded from being covered under the Social Security Act through the making of agreements requested by States:

> "Service performed by employees in positions which are covered by a retirement system on the date the agreement becomes applicable to the coverage group of which they are a part. (The term 'retirement system' is defined in the law as a 'pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof.' The term includes both publicly administered systems and systems administered by private organizations). * * *"

18. By their rulings, the defendants are illegally and wrongfully denying to complainants rights guaranteed to them by the aforesaid provisions of the Social Security Act, as amended. That Act excluded from the Federal Old Age and Survivor Insurance System created
13 thereby only employees covered by public retirement systems established by States or political subdivisions through customary legislative actions of their respective governing bodies. The defendants are refusing to give effect to the definition of the term "retirement system" contained in Section 418 (b) (4) (42 U.S.C.) and are reading the Act as if it did not contain this definition. Besides failing to give effect to the clear language of the statute and the clear meaning and purpose thereof evidenced by its legislative history, the defendants are failing to administer the Act in accordance with the well-established principle that the legislative purpose set forth in a general enactment expresses the legislative policy and only those subjects clearly exempted are to be freed from the operation of the statute.

19. Under the aforesaid rulings of the defendants, all retirement plans covering any employees of a State or political subdivision would be treated as public plans, whereas the language and legislative history of the Act

clearly demonstrate that a distinction was contemplated between public and private retirement plans. Under the aforesaid rulings of the defendants, employees of States or political subdivisions could put themselves out of reach of the Federal Old Age and Survivor Insurance System established by the Social Security Act by the simple device of organizing a private plan at any time before a state-federal agreement becomes applicable to them. These considerations are further illustrative of the fact that the actions and rulings of the defendants are unlawful and contrary to the meaning and purpose of the aforesaid provisions of the Social Security Act, the exclusion of which was intended to refer only to retirement systems legislatively established by state statutes, municipal ordinances or other local laws, and not to private retirement systems such as those covering employees of the Housing Commission and Housing Authorities.

20. The defendants arbitrarily and unlawfully deny the benefits of the Act to complainants and at the same time grant such benefits to others comparably situated through an arbitrary and discriminatory ruling and procedure which predicates coverage upon the non-existence of any retirement plan on the precise date that an agreement with a particular State is entered into by the Federal Security Agency. Under this discriminatory and arbitrary ruling and procedure:

a. The benefits of the Federal Old Age and Survivor Insurance System are granted to public employees who are not covered by any retirement plan on the date of said state-federal agreement, even though it is known and intended at all times that the public employees will immediately thereafter superimpose a private retirement plan over and above said Federal System.

b. The benefits of the Federal Old Age and Survivors Insurance System are denied to public em-

ployees who are subject to a retirement plan on the date of said state-federal agreement unless there is compliance with the illegal, arbitrary and unwarranted condition that their existing retirement plan be liquidated, even though it is known and intended that such public employees will immediately thereafter re-enter a similar private retirement plan so that its additional benefits would be superimposed upon the benefits of said Federal System. In such cases, the defendants are aware at all times that what is contemplated is the discontinuance of the existing retirement plan and, immediately after qualification under the Federal System, its resumption in similar form (which may include modifications reducing contributions by employers and employees with corresponding reductions in benefits).

14 As evidenced by the foregoing, the defendants are not asserting any statutory prohibition against coverage of public employees under both the Federal Old Age and Survivor Insurance System and a private retirement plan, but are unlawfully, unreasonably and arbitrarily withholding the right of such coverage unless the participants in the private retirement plan are prepared to liquidate that plan so that it is not in existence on the date of the applicable state-federal agreement, even though it is contemplated that said private plan will be fully restored to operation promptly thereafter. The action and ruling of the defendants result in a discrimination and denial of the equal protection and benfits of the law. In the Commonwealth of Kentucky, the employees of the Housing Commissions in the Cities of Covington, Frankfort, Newport and Owensboro, who had no private retirement plans when the State-Federal Agreement was made applicable to them, are eligible for Social Security benefits under the Federal Old Age and Survivor Insurance System because the State-Federal Agreement has been amend-

ed to cover them, and those employees can immediately superimpose a private retirement system as additional coverage to the Social Security System. However, the employees of the City of Louisville Municipal Housing Commission who had a private retirement plan at the time that the aforesaid modification was requested in the State-Federal Agreement, are being denied Social Security benefits under the rulings and interpretations of the defendants. The same situation exists in other States. This is an unlawful discrimination, and a denial of the equal protection and benefits of the law, because it means that employees of said Housing Commission and of Housing Authorities similarly situated can never have Social Security protection unless they first liquidate existing private retirement plans to their great disadvantage and loss of vested rights, although they could, after obtaining Federal Old Age and Survivor Insurance Coverage, reinstate such private plans.

21. Defendents' wrongful denial to the complainants, and those for whose benefit this suit is brought, of the benefits they are entitled to under the Social Security Act, as amended, gives rise to a controversy between the complainants and those for whose benefit this suit is brought on the one hand, and the defendants on the other hand.

22. The defendants have acted in an unreasonable, arbitrary and capricious manner and have exceeded their statutory authority and rights; and in taking such actions the defendants are proceeding in a manner which the United States of America as a sovereign has not empowered them to do, but they are acting in a way that the sovereign has forbidden. The complainants are suffering a legal wrong as a result of agency action which is not committed by law to agency discretion. Defendants are not vested with discretion to deny to complainants, and those similarly situated, rights and benefits conferred by the aforesaid Federal statute; the complainants, and those

similarly situated, have complied, or are prepared to comply, with the statutory requirements entitling them to benefits under the Federal Old Age and Survivor Insurance System; and defendants are acting without legal right or authority in conditioning the statutory benefits upon compliance with the unlawful and arbitrary requirement that existing retirement plans be liquidated (albeit temporarily) as a condition precedent to eligibility under the said Federal System.

23. The Social Security Act, as amended, provides that unless application for coverage under it is made before January 1, 1953, certain substantial benefits retroactive to January 1, 1951, will be forever lost to the employees of the Housing Commission and Housing Authorities in whose interest this action is brought. These employees and the Housing Commission and Housing Authorities which em-
ploy them are presently denied eligibility to the
15 Federal Old Age and Survivor Insurance under
the Social Security Act, by the ruling of the defendants. If the decision of this Court is adverse to the contention of the complainants and to those for whose benefit this suit is brought, the complainants and those for whom this suit is brought would have to liquidate their existing contracts to satisfy the Federal Security Agency in order to get the coverage of the Federal Old Age and Survivor Insurance System. The complainants and those for whose benefit this suit is brought and their employees would require at least sixty (60) days prior to January 1, 1953, to enable them to liquidate their present contracts and still take advantage of the substantial benefits of the Social Security Act, as amended, retroactive to January 1, 1951, with the least possible loss of vested rights and accrued benefits under their existing privately insured retirement contracts.

Therefore, we respectfully ask the Court to advance this case in order that the controversy may be decided

at the earliest possible date and that the substantial rights of the complainants and of those for whose benefit this suit is brought and their employees may be fully protected.

WHEREFORE, the complainants pray:

(a) that they be permitted to prosecute this suit on their own behalf and on behalf of all of those for whose benefit this suit is brought who are similarly situated;

(b) that the Court enter a judgment declaring that the complainant, Commonwealth of Kentucky, is entitled to secure the requested modification in its State-Federal Agreement in order to extend the benefits of the Federal Old Age and Survivor Insurance System to employees of the Housing Commission who are not presently covered by the State-Federal Agreement;

(c) that the Court enter a judgment declaring that the definition of retirement plan in Section 418 (b) (4) (42 U.S.C.) includes only public retirement plans created by legislative action of States or political subdivisions and does not include private retirement plans created and administered by private agencies or insurance companies where benefits become available by contract to both public and private employees upon joint premium payments respectively by such employees and their employers;

(d) that accordingly the Court enter a judgment declaring that the aforesaid provisions of the Social Security Act do not exclude the employees of the Housing Commission and Housing Authorities from the benefits of the Federal Old Age and Survivors Insurance System, but that such employees are entitled to the benefits thereunder pursuant to agreements that are entered into by their respective States and the Federal Security Agency;

(e) that the Court restrain the defendants and each of them from carrying out their aforesaid rulings and

from denying to the Commonwealth of Kentucky the right to secure the requested modification in its State-Federal Agreement, and to other States the right to secure similar modifications or provisions in state-federal agreements, so that employees of the Housing Commission and Housing Authorities may secure
16 coverage under the Federal Old Age and Survivor Insurance System without the Housing Commission and Housing Authorities being first required to comply with the aforesaid illegal and unwarranted condition that they liquidate the private retirement plans covering their respective employees so that such plans will not be in effect on the date of coverage under said Federal System (but can become effective again promptly after such coverage in the said Federal System).

(f) for such further and other relief as to the Court may seem just and proper.

KROOTH & ALTMAN
By DAVID L. KROOTH
1025 Vermont Avenue, N.W.
Washington, D. C.
Attorney for the Complainants.

R. CAMPBELL VAN SANT, Attorney
Department of Economic Security,
Division of Personnel Security
Commonwealth of Kentucky
Frankfort, Kentucky

MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN
By LEO T. WOLFORD
501 South Second Street
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NICHOLAS H. DOSKER
419 West Jefferson Street
Louisville, Kentucky

Of Counsel

17 Filed June 9, 1952

Exhibit "A"

AGREEMENT

(Coverage of State and Local Employees Under Old Age and Survivors Insurance, Provisions of Title II of the Social Security Act)

The Federal Security Administrator, hereinafter called Administrator, and the Commonwealth of Kentucky, hereby agree, in accordance with the terms and conditions stated in this agreement, to extend, in conformity with Section 218 of the Social Security Act and Senate Bill No. 1, 1951 Extraordinary Session of the General Assembly of the Commonwealth of Kentucky, the insurance system established by Title II of the Social Security Act, to services performed by individuals as employees of the Commonwealth and as employees of those political subdivisions of the Commonwealth listed in the appendix attached hereto and made a part hereof, except services expressly excluded from this agreement.

(A) *Definitions*

For the purpose of this agreement—

(1) The term "political subdivision" includes an instrumentality of——

(a) The Commonwealth.

(b) One or more political subdivisions of the Commonwealth or,

(c) The Commonwealth and one or more of its political subdivisions, but does not include a joint instrumentality of the Commonwealth and any other state or states.

(2) The term "employee" means an employee as defined in Section 210 (k) of the Social Security Act and shall include an officer of the Commonwealth or of a political subdivision thereof.

(3) The term "retirement system" means a pension, annuity, retirement, or similar fund or system established by the Commonwealth or by a political subdivision thereof.

(4) A "coverage group" means a coverage group as defined in Section 218 (b) (5) of the Social Security Act.

(B) *Services Covered*

This agreement includes all services performed by individuals as employees of the Commonwealth and as employees of those political subdivisions listed in the
18 appendix attached hereto, except;

(1) Any services performed by an employee in a position which is covered by a retirement system on the date this agreement becomes applicable to the coverage group to which such employee belongs.

(2) Service performed by an employee who is engaged in work relief or other program designed to relieve individuals from unemployment.

(3) Service performed in a hospital, home or other institution by an inmate thereof.

(4) Covered transportation service (as defined in Section 210 (1) of the Social Security Act), and

(5) Service (other than agricultural labor or service performed by a student) excluded from employment by any provision of Section 210 (a) of the Social Security Act, other than paragraph (8) of such section.

(6) Service of an emergency nature, as defined by the Division of Personnel Efficiency in the Department of Finance of the Commonwealth of Kentucky, and approved by the Federal Security Administrator.

(C) *Contributions of the Commonwealth*

The Commonwealth will pay to the Secretary of the Treasury, at such time or times as the Administrator may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed by Sections 1400 and 1410 of the Internal Revenue Code if the services of employees covered by this agreement constituted employment as defined in Section 1426 of such code.

(D) *Compliance With Regulations*

The Commonwealth will comply with such regulations as the Administrator may prescribe to carry out the purposes of Section 218 of the Social Security Act.

(E) *Modification*

This agreement will be modified at the request of the Commonwealth to include political subdivisions or coverage groups, or both, in addition to those listed in the appendix, or to include additional services not now included in this agreement, such modification to be consistent with the provisions of Section 218 of the Social Security Act.

19 (F) *Termination by the Commonwealth*

The Commonwealth, upon giving at least two years advance notice in writing to the Administrator, may terminate this agreement, either in its entirety or with respect to any coverage group, effective at the end of a calendar quarter specified in the notice, provided, however, that the agreement may be terminated in its entirety only if it has been in effect from the effective date specified under Part (I) for not less than five years prior to receipt of such notice, and provided further that the agreement may be terminated with respect to any coverage group only if it has been in effect with respect to such coverage group for not less than five years prior to receipt of such notice.

(G) *Termination by the Administrator*

If the Administrator, after notice and opportunity for a hearing to the Commonwealth, finds that the Commonwealth has failed or is no longer legally able to comply substantially with any provision of this agreement or of Section 218 of the Social Security Act, he shall notify the Commonwealth by giving notification in writing to the Governor of the Commonwealth that this agreement will be terminated in its entirety, or with respect to any one or more coverage groups, or political subdivisions, at such time, not later than two years from the date of such notification, as he deems appropriate and designates therein, unless prior to such time he finds that there no longer is any such failure or that the cause for such legal inability has been removed. If under this part or part (F), an agreement is terminated with respect to any coverage group, or any political subdivision, such termination shall be effective also with respect to any additional services in such coverage group or political subdivision included in the agreement pursuant to any modification thereof under part (E).

(H) *Adjustments, Refunds and Interest on Delinquent Payments*

(1) If more or less than the correct amount due under part (C) of this agreement is paid with respect to any payment of remuneration, proper adjustments with respect to the amounts due under part (C) shall be made, without interest, upon such conditions, in such manner, and at such times, as may be prescribed by regulation of the Administrator. If an overpayment cannot be adjusted under this subpart, refund shall be made in accordance with Section 218 (h) (3) of the Social Security Act.

(2) If the Commonwealth does not make, at the time or times due, the payments provided for under

this agreement, there shall be added, as part of the amounts due (except in the case of adjustments made in accordance with the provisions of subpart (1) of this part), interest at the rate of six per centum per annum from the date due until paid, and without prejudice to other available methods of collection, the Administrator, in his discretion, may deduct such amounts plus interest from any amounts, now or hereafter provided, which he may certify to the Secretary of the Treasury for payment to the Commonwealth under any provision of the Social Security Act. Amounts so deducted shall be deemed to have been paid to the State under such provision of the Social Security Act.

(I) *Effective Date*

This agreement shall be effective as of January 1, 1951.

This agreement is entered into this 27th day of April, 1951, by Arthur J. Altmeyer, Commissioner for Social Security, pursuant to Section 218 of the Social Security Act, acting herein by virtue of the authority vested in him by Oscar R. Ewing, Federal Security Administrator, in Federal Security Agency Order 9, dated March 8, 1951, and the Commonwealth of Kentucky, acting herein through V. E. Barnes, Commissioner of the Department of Economic Security, by virtue of the authority granted by Section (3) of Senate Bill No. 1, 1951 Extraordinary Session of the General Assembly of the Commonwealth of Kentucky, and subject to the provisions of the Constitutions of the Commonwealth and the United States of America.

(Signed.) A. J. Altmeyer
(Commissioner for Social Security)
(Signed.) V. E. Barnes
(Commissioner)
(Department of Economic Security)

APPROVED:

(s.) A. E. FUNK
(Attorney General, Commonwealth of Kentucky)

(s.) LAWRENCE W. WETHERBY
(Governor, Commonwealth of Kentucky)

* * * * * * * * * *

31 MODIFICATION NO. 3

To Kentucky State Social Security Agreement

The Federal Security Administrator and the State of Kentucky, acting through its representative designated to administer its responsibilities under the Agreement of April 27, 1951, hereby accept as additional coverage groups under said Agreement and acknowledge the full applicability of the original Agreement to the following:

	Political Subdivision	Effective Date	Excluded Services
* * * * * * * * * *			
32	Treasurer, City of Covington Municipal Housing Commission Covington, Kentucky	January 1, 1951	None
* * * * * * * * * *			
33	Treasurer Frankfort Municipal Housing Comm. 901 Leestown Road Frankfort, Kentucky	January 1, 1951	(a) Part-time positions
* * * * * * * * * *			

42 MODIFICATION NO. 4

To Kentucky State Social Security Agreement

The Federal Security Administrator and the State of Kentucky, acting through its representative designated to administer its responsibilities under the Agreement of April 27, 1951, hereby accept as additional coverage groups under said Agreement and acknowledge the full applicability of the original Agreement to the following:

Political Subdivision	Effective Date	Excluded Services
* * * * * * * * * *		
46 Secretary Newport Municipal Housing Commission Room 401 Finance Building Newport, Kentucky	January 1, 1951	(a) Part-time positions
Executive Director Owensboro Municipal Housing Commission 316 Hale Avenue Owensboro, Kentucky	October 1, 1951	None
* * * * * * * * * *		

The effective date of each of these coverage groups is shown opposite each Political Subdivision.

47 Approved for the State of Kentucky this 31st day of December, 1951.

By: s/s V. E. BARNES
Commissioner

Approved for the Federal Security Administrator this 11th day of February, 1952.

By: s/s A. J. ALTMEYER
Commissioner for Social Security

57 **Exhibit "B"**

Filed June 9, 1952

April 29, 1952

Honorable Oscar R. Ewing
Administrator, Federal Security Agency
and
Honorable Arthur J. Altmeyer
Commissioner, Social Security Administration
Federal Security Building
4th and Independence Avenue, N. W.
Washington, D. C.

Gentlemen:

With reference to the Agreement entered into April 27, 1951, and amended from time to time (which Agreement, as amended, is hereinafter called the "State-Federal Agreement") by the Federal Security Administrator, acting through Arthur J. Altmeyer, Commissioner for Social Security and the Commonwealth of Kentucky, acting through V. E. Barnes, Commissioner of the Department of Economic Security, we hereby request, on behalf of the Commonwealth of Kentucky, a modification of said State-Federal Agreement to include the following political subdivisions in addition to those now listed in the appendices attached thereto:

all of the employees of the City of Louisville Municipal Housing Commission and all of the employees of the City of Lexington Municipal Housing Commission, respectively, including any such employees who are now covered by certain retirement plans (the nature of such plans being known to you). Under these retirement plans, benefits became available to the employees of said Housing Commissions through contracts with private companies, who had previously created and were administering the plans, and through payments of premiums by both the employees and the Housing Commissions.

This request for a modification to the State-Federal Agreement is made on the express condition that the State-Federal Agreement is not to be amended to cover the aforesaid Housing Commissions and their employees unless the modification will cover all the employees of said Housing Commissions including those under the aforesaid retirement plans.

In connection with this request, please be advised that we have made the following determinations:

1. That under the terms of the Act entitled "AN ACT to provide for the coverage of certain officers and employes of the state and local governments, the political subdivisions and agencies thereof, and interstate instrumentalities, and the dependents and survivors of such officers and employes, under the Old-Age and Survivors Insurance provisions of Title II of the Federal Social Security Act, as amended, making an appropriation therefor, and declaring an emergency to exist," approved March 14, 1951, the Commonwealth of Kentucky is authorized to modify the State-Federal Agreement to provide the coverage requested for the employees of said Housing Commissions.

The intent of said Act and Title II of the Social
58 Security Act was to exclude from coverage by State-Federal Agreements only employees covered by public retirement plans established by the state or a political subdivision thereof. It was not intended to exclude employees of said Housing Commissions who were covered by retirement plans (which cover employees of both private and public employers) created and administered by private companies, or those employees who are participants in annuity contracts entitling such a participant to receive a yearly amount of Annuity commencing on a date certain which, under the contract, is designated "Normal Retirement Date."

2. That said Housing Commissions are instrumentalities of the Commonwealth of Kentucky and, accordingly,

they are political subdivisions of the Commonwealth within the meaning of Section 2(f) of the aforesaid Act, approved March 14, 1951, and Section 218 (b) (c) of the Social Security Act, as amended. The employees of each of said Housing Commissions constitute a separate coverage group.

3. That we informally approved the plans, and the requested modification of the State-Federal Agreement, to extend the benefits of Title II of the Social Security Act to all the aforesaid employees of said Housing Commissions as being in conformity with the applicable provisions of the Social Security Act and the applicable provisions of our state laws and regulations.

We would appreciate your prompt advise whether you are prepared to enter into a modification of the State-Federal Agreement in conformity with this request.

Yours very truly,

V. E. BARNES, *Commissioner*
/s/ H. B. FITHIAN
By: H. B. FITHIAN, *Director*
Division of Personnel Security

HBF:jh

* * * * * * * * * *

59 **Exhibit "C"**

FEDERAL SECURITY AGENCY

June 4, 1952

Dear Mr. Barnes:

This is in reply to the two letters written by Mr. H. B. Fithian, Director, Division of Personnel Security, dated April 29, 1952, addressed to me and to the Commissioner for Social Security. Mr. Fithian wants to know if we are prepared to enter into a modification of the Kentucky old-age and survivors insurance coverage agreement which would extend coverage thereunder to all employees of the

City of Louisville Municipal Housing Commission and of the City of Lexington Municipal Housing Commission.

In one of these letters it is stated that the housing commissions are instrumentalities of the Commonwealth of Kentucky and accordingly they are political subdivisions of the State of Kentucky within the meaning of the Social Security Act. It is further indicated in this letter that there are in existence retirement plans or annuity contracts which cover the positions of certain employees of both of these housing commissions. It is contended that the intent of Section 218 (d) of the Social Security Act, as amended, was not to exclude from coverage under a Federal-State agreement "employees of said housing commissions who were covered by retirement plans (which cover employees of both private and public employers) created and administered by private companies, or those employees who are participants in annuity contracts entitling such a participant to receive a yearly amount of annuity commencing on a date certain which, under the contract, is designated 'Normal Retirement Date'."

Section 218 (d) of the Federal law provides that:

"No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group."

The term "retirement system" is defined in Section 218(b)(4) of the Act as a "pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof"; and the term "coverage group" is defined in Section 218(b)(6) to include in part the employees of the State or the employees of a political subdivision of a State.

If our information is correct it would appear that the retirement systems of these housing commissions consist

of participation in the plans of the National Health and Welfare Retirement Association. An examination of the provisions made for the payment of retirement benefits to employees of housing authorities which are members of the National Health and Welfare Retirement Association convinces us that such authorities have established retirement systems for their employees within the meaning of Section 218(b)(4) of the Act. The constitution and bylaws of the National Health and Welfare Retirement Association state that the Association is organized for the purpose of providing pension benefits to employees of the Association and the employees of members of the Association. Members of the Association may include local housing authorities. These authorities may participate in the retirement program of the Association if formal action is taken by the governing body of the authority to adopt the program and if at least 75 percent of the employees of the authority consent to participate. Following such action by the authority and its employees, every individual thereafter employed by the authority may participate in the retirement plan. The retirement benefits payable to employees of the authority are financed through contributions made both by the employees and the member housing authority.

From the foregoing, it is apparent that to become a member of the Association, a local public housing authority must first determine that retirement benefits should be provided for its employees and that it wishes to provide such benefits through the Association's plan. While it is true that the details relating to the payment of contributions, the conditions of eligibility, and the terms of payment of benefits are administered by the Association, it is the action of the local housing authority in adopting the plan of the Association that constitutes the act of establishing a retirement system for the employees of the housing authority. Each local housing authority, in availing itself of membership in the Association and by paying

contributions in behalf of its employees to the Association, thus establishes a retirement plan for the payment of benefits to its employees.

Under the circumstances, therefore, we believe that these housing commissions which are members of the retirement plan operated by the National Health and Welfare Association have established a retirement system for their employees within the meaning of Section 218(b)(4) of the Social Security Act. It also follows from this conclusion that these employees of the housing commissions who are in positions covered by the retirement system on the date that the agreement with the State of Kentucky becomes applicable to the housing commissions would not be eligible for coverage under the old-age and survivors insurance program.

I will, of course, be glad to enter into a modification extending coverage to the employees of those housing commissions whose positions are not covered by the existing retirement system.

Sincerely yours,

/s/ JOHN L. THURSTON
Acting Administrator

Mr. V. E. BARNES
Commissioner
Economic Security
State of Kentucky
Frankfort, Kentucky

* * * * * * * * * *

61 Filed Aug. 13, 1952

Motion to Dismiss

Come now the defendants and by their attorney, the United States Attorney, move this Court to dismiss the above-entitled complaint for the reason that it is a suit against the United States without its consent, and therefore the Court is without jurisdiction of the subject

matter, and the complaint fails to state a claim upon which relief may be granted.

CHARLES M. IRELAN
United States Attorney
ROSS O'DONOGHUE
Assistant United States Attorney

* * * * * * * * * *

62 Filed Sept. 15, 1952

Reply in Opposition to Defendants' Motion to Dismiss

Come now complainants and, by their undersigned Attorneys, make this reply in opposition to the defendants' Motion to Dismiss the above entitled complaint for the reason that the Court has jurisdiction over this action and that the complaint states a claim upon which relief may be granted. There is filed herewith a Memorandum of Points and Authorities in support of our opposition to the Motion to Dismiss.

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Department of Economic Security
Division of Personnel Security
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Attorneys for the Complainants

NICHOLAS H. DOSKER
419 West Jefferson Street
Louisville, Kentucky

* * * * * * * * * *

63 Filed May 6, 1953

Washington, D. C.,
Tuesday, April 28, 1953.

Opinion and Ruling on Motion to Dismiss Complaint, by the Hon. Alexander Holtzoff, Judge

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64 The Court: The questions involved in this motion have been very ably presented by counsel for both sides, and the Court has been greatly aided both by the briefs and by the oral arguments.

The Court is of the opinion that, contrary to the contention of the Government, this is not a suit against the United States but rather an action for relief against a Government officer in the nature of a writ of mandamus. Consequently, this suit should be judged by those criteria that apply to actions for relief in the nature of mandamus against Government officers.

The question involved here is whether the Government officer correctly construed a statutory provision prescribing certain duties to be performed by him. It is possible to construe the statute either in the manner in which it was interpreted by the Government officer or in the way urged by counsel for the Commonwealth of Kentucky.

The law is clear that unless the action to be performed by the Federal official is purely ministerial the courts may not review and set aside the administrative decision, if there is a rational basis for it.

This proposition has been laid down in a long line of authorities. One of the leading cases is Hammond versus Hull, 76 Appeals D. C. 301-303, in which Mr. Justice Justin Miller says this:

65 "When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interfered with, certainly unless it is clearly wrong in the official action, arbitrary and capricious."

This doctrine has been followed by this Court in the case of State of Indiana against Ewing, 99 Fed. Sup. 734, as well as in many other cases.

The Court cannot say in this instance that the construction placed upon the statute by the Federal officer is clearly wrong or that his action is arbitrary or capricious, even in the legal sense, because the Court is of the opinion that the statute is subject to both interpretations, and certainly the one adopted by the defendant cannot be said to be clearly erroneous.

Counsel for the plaintiff point to the Administrative Procedure Act and to the Social Security Act as a basis for the right to secure a judicial review of the Administrator's decision. True, the Social Security Act, U. S. Code Title 42 Section 405 (g), provides that any individual after any final decision of the Administrator, made after a hearing to which he was a party, may obtain a review of such decision by a civil action brought in the United States District Court for the judicial district in
66 which the plaintiff resides, or in the United States District Court for the District of Columbia.

Taking that provision in the light of its context, however, it must be construed as being limited to decisions made by the administrative officer on individual claims, because other subsections of this section provide for hearings, for findings of fact, and decisions.

In the light of the considerations that have just been reviewed, the Court is of the opinion that this action may not be maintained and the motion to dismiss is granted.

* * * * * * * * * *

67 Filed May 11, 1953

Order

By agreement of the parties, the Court being sufficiently advised:

(1) It appearing that Oscar R. Ewing is no longer Administrator of Federal Security Agency and that Oveta Culp Hobby, Secretary of Health, Education and Welfare has succeeded to the duties of the said Oscar R. Ewing;

It Is Hereby Ordered that the said Oveta Culp Hobby, Secretary of Health, Education and Welfare be substituted as one of the defendants herein in lieu of Oscar R. Ewing;

(2) It appearing that the defendant, Arthur J. Altmeyer, is no longer Commissioner of Social Security Administration and that he has been succeeded by William L. Mitchell as Acting Commissioner of Social Security;

It Is Hereby Ordered that said William L. Mitchell as Acting Commissioner of Social Security be substituted as one of the defendants herein in lieu of Arthur J. Altmeyer; and

(3) It appearing that the plaintiff, Marshall F. Dumeyer has recently died and that Harold M. Booth, an employee of the City of Louisville Municipal Housing Commission (herein called "Housing Commission") and Accounting Director thereof, is being substituted herein in lieu of Marshall F. Dumeyer suing on behalf of himself and other employees of the Housing Commission and the employees of other low-rent housing authorities similarly situated;

It Is Hereby Ordered that the said Harold M. Booth, an employee of the Housing Commission and Accounting Director thereof, be substituted as one of the plaintiffs herein in lieu of Marshall F. Dumeyer suing on behalf of himself and other employees of the Housing Commission and the employees of other low-rent housing authorities similarly situated;

(4) The defendants Oveta Culp Hobby, Secretary of Health, Education and Welfare and William L. Mitchell, Acting Commissioner of Social Security and the plaintiff Harold M. Booth, employee of the Housing Commission suing on behalf of himself and others similarly situated, expressly assent to be substituted as such parties in this action.

ALEXANDER HOLTZOFF
United States District Judge

Agreed to:

ROSS O'DONOGHUE
Ass't United States Attorney

DAVID L. KROOTH
Attorney for the Plaintiffs

* * * * * * * * * *

68 Filed May 11, 1953

Order

This cause having come on for hearing on the defendants' motion to dismiss the complaint; and

The Court having heard arguments on behalf of the parties;

IT IS HEREBY ORDERED that the Plaintiffs' complaint be and it is hereby dismissed.

ALEXANDER HOLTZOFF
United States District Judge

* * * * * * * * * *

69 Filed May 26, 1953

Notice of Appeal

Notice is hereby given this 26th day of May, 1953 that Plaintiffs, Commonwealth of Kentucky, ex rel, Department of Economic Security, et al, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order of this Court entered on the 11th day of May, 1953 dismissing the Plaintiffs' Complaint herein.

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* * * * * * * * * *

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11826

COMMONWEALTH OF KENTUCKY, EX REL., DEPARTMENT OF ECONOMIC SECURITY, ET AL., APPELLANTS

v.

OVETA CULP HOBBY, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LEO A. ROVER,
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WILLIAM J. PECK,
Assistant United States Attorney.

Of Counsel:
PARKE M. BANTA,
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Assistant General Counsel;
IRA Z. ACOFF,
Of the Department of Health, Education, and Welfare.

No. 11826

STATEMENT OF QUESTIONS PRESENTED

Appellants bring this suit to have appellee enter into an agreement extending the Federal Old Age and Survivors Insurance Program to certain Commonwealth employees.

1. Do the courts have jurisdiction over a controversy concerning the creation and making of an agreement, which agreement would have the effect of obligating the Federal government to expend treasury moneys for the benefit of certain private individuals.

2. After the District Court has dismissed a complaint for failure to state a cause of action, on the ground that appellees' interpretation of the clause "fund or system established by a state or by a political subdivision thereof" rests upon a rational basis, what is the proper scope of review in an appeal from that District Court ruling?

3. Is the retirement system in which the members of the City of Louisville Municipal Housing Commission participate as a result of action taken by the said Commission, a system "established" by the Commission within the meaning of Section 218 of the Social Security Act (42 U. S. C. 418).

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v.

OVETA CULP HOBBY, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

A brief description of the background of this litigation and of the Federal Old Age and Survivors Insurance program relative to coverage of State employees is important in the presentation of the legal issues involved. Therefore, the appellees make the following counterstatement of the case.

Under the Social Security Act (42 U. S. C. 301, *et seq.*), the appellees are charged with the administration of the Federal programs for grants to states for public assistance, and Federal Old Age and Survivors Insurance (42 U. S. C. 401, *et seq.*). By amendments, approved August 8, 1950, Congress provided for the extension of the latter program to cover certain employees of states and political subdivisions thereof (42 U. S. C. 418, Act of Aug. 28, 1950, c. 890, Title I, Sec. 106, 64 Stat. 514). This section set forth the conditions under which a proposed

agreement, extending coverage to given State employees, was or was not to be approved by the Administrator of the Federal Old Age and Survivors Insurance Program. Congress directed that State employees covered by a "retirement system" were not to be included in any agreement approved by the Administrator. The phrase "retirement system" was defined to mean:

> * * * a pension, annuity, retirement, similar fund or system established by a state or by a political subdivision thereof. (42 U. S. C. 418 (b) (4).)

The appellant submitted to appellees for approval an agreement which would extend Federal Old Age and Survivors Insurance to employees of the City of Louisville Municipal Housing Commission. After study and investigation, appellees learned these employees were then covered by certain existing retirement systems through arrangement with a private insurance company. A hearing was held for the purpose of receiving testimony bearing on the question whether this existing retirement system was of such nature as to fall outside the authority granted to appellees by the statute (42 U. S. C. 418). After this hearing, and a study of the insurance program of the private insurance company, appellees wrote appellants a letter rejecting the proposed agreement and fully setting forth their reasons for so doing (J. A. 39–42).

On June 9, 1952, appellants filed in the District Court a complaint in which they sought "declaratory, injunctive and mandatory relief under the Declaratory Judgment Act, the Federal Administrative Procedure Act and other applicable laws and authorities" (J. A. 4). On August 13, 1952, appellees filed a Motion to Dismiss (J. A. 42). This motion was predicated upon two grounds, that this suit violated sovereign immunity, and the complaint failed to state a claim upon which relief could be granted. The only other pleading filed was appellants' opposition to this Motion to Dismiss. The District Court granted this Motion saying, in part (J. A. 44):

> The question involved here is whether the Government officer correctly construed a statutory provision prescribing certain duties to be performed by him. It

is possible to construe the statute either in the manner in which it was interpreted by the Government officer or in the way urged by counsel for the Commonwealth of Kentucky.

The law is clear that unless the action to be performed by the Federal official is purely ministerial the courts may not review and set aside the administrative decision, if there is a rational basis for it.

STATUTE INVOLVED

The Social Security Act Amendments involved are the amendments to the Social Security Act, approved August 28, 1950 (42 U. S. C. 418; Act of Aug. 28, 1950, Ch. 809, Title I, Sec. 106, 64 Stat. 514):

(1) Section 418 (d) of 42 U. S. C. which reads as follows:

> No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group.

(2) Section 418 (b) (4), which contains the definition of the term "retirement system", which reads as follows:

> The term "retirement system" means a pension, annuity, retirement, similar fund or system established by a State or by a political subdivision thereof.

SUMMARY OF ARGUMENT

Patently, this application for coverage under the Federal Old Age and Survivors Insurance Program, was for the purpose of obtaining the benefits of a federally operated trust fund and contributions of public monies made to that trust fund. This suit, having this same objective, is a quest for relief which would expend itself upon the United States Treasury. Therefore this suit is against the sovereign. The law is clear that the Administrative Procedure Act is not to be construed as consent to a suit against the sovereign, and does not cure the juris-

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dictional defect which is inherent in a suit against the sovereign.

Appellate review of this case is limited to determining whether the complaint states a cause of action. Such cause of action is stated only if the *administrative* interpretation is unsupported by a rational or reasonable basis in law. This is the sole question for judicial review. Under no circumstances, in the present posture of the case, can this Court evaluate the merits of *appellants'* interpretation of the statute.

The words of the statute are clear and unambiguous. There is no need to search the legislative history of this statute. However, such search reveals nothing to impeach the plain meaning of the words of the statute. Legislative intent to employ the plain meaning of the statutory terms is indicated by the statutory scheme and the defined use of different phraseology in other portions of the same statute. This plain meaning does not lead to unreasonable and discriminatory results.

ARGUMENT

I

The Courts are without jurisdiction over this action

This is a suit against the United States wherein it has not consented to be sued, brought by parties without standing to sue in the circumstances described herein.

(A) This suit is against the sovereign

No principle is more firmly established or judicially noted than the fundamental rule that the United States may not be sued without its consent. *Larson* v. *Domestic and Foreign Corp.*, 337 U. S. 682; *United States* v. *Shaw*, 309 U. S. 495; *Federal Housing Administration* v. *Burr*, 309 U. S. 214; *Ickes* v. *Fox*, 300 U. S. 82; *Moffat Tunnel League* v. *United States*, 289 U. S. 113; *Morrison* v. *Work*, 266 U. S. 481. The rationale behind this rule is perhaps best expressed by the language of Mr. Justice Field in the case of *The Siren*, 74 U. S. 7, wherein at p. 152, he states:

> It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his

> consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is therefore without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke,* 33 U. S. 8 Pet. 444 [8: 1004]. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property.

The rule is equally applicable to suits by a state as well as those by an individual. *Minnesota* v. *United States,* 305 U. S. 387. In determining what is a suit against the United States, the denomination of the parties is not controlling. *Larson* v. *Domestic and Foreign Corp., supra*; *Wells* v. *Roper,* 246 U. S. 755. Rather, it is "the essential nature and effect of the proceeding" which is determinative. *Land* v. *Dollar,* 330 U. S. 731. As stated in the *Larson* case, *supra,* which involved a suit nominally against the Administrator of the War Assets Administration to restrain him from selling a consignment of coal in which the plaintiff claimed an interest, at p. 688:

> In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this

> question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem,* of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Reference to the complain herein readily indicates that the relief sought is against the appellees, not in their private or personal capacity, but rather against them as officers of the sovereign and as agents and arms of the Government. Being such, it is manifest that the compulsion sought is, in reality, compulsion against the sovereign. Therefore, unless appellant can bring itself within the area of one of the general exceptions to the rule of sovereign immunity, it is obvious that this suit must fail as one against the United States to which no consent has been given.

Within the boundaries of the doctrine of sovereign immunity, there have developed two general categories where the courts have held that the action sought is not against the sovereign and, therefore, jurisdiction obtains. The first, where the officer's powers are limited by statute and actions beyond that statutory limitation are considered individual and not sovereign actions. See *Work* v. *Louisiana,* 269 U. S. 250; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605. This exception is perhaps best delineated in the *Larson* case, *supra,* wherein at p. 689 the Court said:

> There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home,

> he presumably could be enjoined from later conveying it to a third person. On a similar theory where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.

As applied to the instant case, it must appear that there can be no basis for any assertion that the Administrator has, in any sense, acted beyond his statutory authority. By virtue of the provisions of the Act, the Administrator's statutory authority for his action is most explicit. Under these provisions he is called upon by the statute to make the decision made herein.

The second exception to the rule of sovereign immunity is where the statute or order conferring power on the officer to act on behalf of a sovereign is claimed to be unconstitutional. See *Ex parte Young*, 209 U. S. 123; *Pennoyer* v. *McConnaughy*, 140 U. S. 1. This exception is outlined in the *Larson* case, *supra*, at p. 690, wherein it is said:

> A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for *habeas corpus* against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

The appellant does not claim, nor can it do so, that the Social Security Act or any part thereof is unconstitutional. *Massachusetts* v. *Mellon,* 262 U. S. 447.

As stated in the *Larson* case, *supra,* at p. 690:

> These two types have frequently been recognized by this court as the only ones in which a restraint may be obtained against the conduct of Government officials.

Obviously, not being within the two classifications wherein the Supreme Court has held that the suit is against the individual and not the sovereign and is, therefore, not a suit against the United States, the appellant must rely on the argument, as it seems to do, that the officer's decision is erroneous and arbitrary and being such, is beyond his power and hence not the action of the sovereign. This argument was advanced in the *Larson* case, *supra,* and summarily rejected, the Court stating at p. 695:

> If, of course, it is assumed that the basis of the doctrine of sovereign immunity is the thesis that the king can do no wrong, then it may be also assumed that if the king's agent does wrong that action cannot be the action of the king. It is on some such argument that the position of the respondent rests. It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams* v. *Nagle,* 303 U. S. 532, 542 (1938). We therefore reject the contention here. We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, when they are the ac-

> tions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.

Reduced to its essentials, appellant's claim can amount to nothing more than that in exercising the statutory authority, appellee has committed error. This, as has been shown, is not enough. "A claim of error in the exercise of that power is, therefore, not sufficient." *Larson, supra.*

From the foregoing, it is apparent that appellant's action is not within the exceptions delineated by the *Larson* case, wherein official conduct can be restrained, rather it must appear that the action sought herein is directly designed to expand itself on the public treasury and to coerce the action of the sovereign, and being such, is a suit against the United States which has not consented to be sued. *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371; *Land* v. *Dollar, supra; Wells* v. *Roper, supra; Louisiana* v. *McAdoo,* 234 U. S. 627; *Hagood* v. *Southern,* 117 U. S. 52.

The *Mine Safety* case, *supra,* involved an action closely analogous to the instant one. That was a suit brought by a Government contractor against the Undersecretary of the Navy to restrain him from taking action under the Renegotiation Act to withhold payment from the Government of monies due the plaintiff. The Court, in holding that there was no jurisdiction as the United States was an indispensable party and had not consented to be sued, said at p. 374:

> The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relin-

> quish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party, *Minnesota* v. *United States,* 305 U. S. 382, 388.

The Supreme Court in *Land* v. *Dollar, supra,* in discussing the doctrine of sovereign immunity effectively highlighted this proposition, saying at p. 738:

> The "essential nature and effect of the proceeding" may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. Ex parte New York, 256 U. S. 490, 500, 502. If so, the suit is one against the sovereign.

From the foregoing, it is patent that the net effect of the action sought herein is to expend itself directly upon the public treasury.

Again the essential nature and effect of the proceeding herein would be in the words of the *Land* case, *supra,* to "interfere with the public administration." Appellee, being charged by statute with the administration of the Social Security Act and required by Act to certify funds for approved plans, it is obvious that the action sought herein is designed to coerce and interfere with the appellee's exercise of an undoubtedly sovereign function and as such, must fail. *Morrison* v. *Work, supra*; *Wells* v. *Roper, supra*; *Oregon* v. *Hitchcock,* 202 U. S. 60; *Louisiana* v. *Jumel,* 107 U. S. 711. In the *Work* case, *supra,* the Court in holding that it was without jurisdiction to entertain a suit to enjoin the Secretary of the Treasury and others in their administration of the Indian Lands, stated at pp. 485, 488:

> To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress had not consented that it be sued.

And in *Wells* v. *Roper, supra,* wherein it was sought to restrain the defendant, as Assistant Postmaster General, from annulling a mail contract held by the plaintiff, the Court in refusing relief stated at p. 337:

> That the interests of the government are so directly involved as to make the United States a necessary party, and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties.

In the *Jumel* case, *supra,* the Court held that if a state had submitted to the jurisdiction of the courts, then coercion of public officials in the exercise of their official acts might be proper, but at p. 728:

> * * * this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

The relief sought herein is aimed at an official of the United States. No challenge is made as to the constitutionality of the statute under which he acts. Nor can there we any serious claim that in making his decision he exceeded his statutory authority, the statute expressly authorizing him to make the

decision of which appellant complains. The best that appellant can claim is that in reaching his decision, appellee committed error. This, as has been shown under the authority of the *Larson* case, *supra*, is not enough. Therefore, in seeking relief against the appellee, the appellant is, in reality, seeking action which will expend itself on the public treasury and interfere with the public administration. This action is, therefore, a suit against the United States.

B. The sovereign has not consented to the maintenance of this suit

Appellant argues at p. 30 of its brief that section 10 of the Administrative Procedure Act, 5 U. S. C. 1009, is consent of the sovereign to this suit. The argument admits that in the absence of section 10 this suit is beyond the jurisdiction of the courts and may not be maintained. *Larson* v. *Domestic and Foreign Corp., supra.* The effect of section 10 was discussed by this Court in *United Gas Pipe Line Co.* v. *Federal Power Commission*, 86 U. S. App. D. C. 314, 318, 181 F. 2d 796, 800 (1950), saying:

> Section 10 (b) of the Administrative Procedure Act, 5 U. S. C. § 1009 (b), has not changed preexisting law in this regard. It merely makes injunctions and certain extraordinary legal remedies available in a *proper action* instituted in a court of original jurisdiction. [Emphasis supplied in lieu of original emphasis.]

The issue whether section 10 had the effect of extending jurisdiction when jurisdiction did not exist prior to enactment of that section was squarely met in two cases: *Almour* v. *Pace*, 90 U. S. App. D. C. 63, 193 F. 2d 699 (1951); and, *Aktiebolaget Bofors* v. *United States*, 90 U. S. App. D. C. 92, 194 F. 2d 145 (1951). *Almour* involved a suit to compel the payment of the salary of an Army officer. After finding the controversy to be in the exclusive jurisdiction of the Court of Claims, the Court said, at p. 65:

> The lack of jurisdiction in the district courts in this regard cannot be cured by resort to the Declaratory Judgment or Administrative Procedure Acts. *Di Benedetto* v. *Morganthau,* 80 U. S. App. D. C. 34, 148 F. 2d 223; *Marshall* v. *Crotty,* 1 Cir., 185 F. 2d 622; *Brishois* v. *Hague,* D. C. Mass., 85 F. Supp. 13.

Bofors involved an attempt to collect damages from the government for infringement of a patent. After finding it had no jurisdiction over the subject matter the Court said, at p. 96:

> Appellant urges, however, that § 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, waives the government's immunity from suit and permits this action against the officers by providing in subsection (a) that "Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof." We have recently said that § 10 of the Administrative Procedure Act does not extend the jurisdiction of any court to cases not otherwise within its competence. *Almour* v. *Pace,* 1951, 90 U. S. App. D. C. 63, 193 F. 2d 699.

The validity of these rulings by this Court was impliedly recognized by the Supreme Court in a recent decision. In *Blackmar* v. *Guerre,* 342 U. S. 512, 515, 72 S. Ct. 410, 96 L. Ed. 534 (1952), the Supreme Court bluntly cast aside the same argument which is now advanced by appellant, saying:

> It is further suggested that judicial review is authorized by the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.* Certainly there is no specific authorization in that Act for suit against the Commission as an entity. *Still less is the Act to be deemed an implied waiver of all governmental immunity from suit.* [Emphasis added.]

Thus it has been made clear that section 10 confers no jurisdiction where jurisdiction was nonexistent prior to its enactment.

II

Arising, as it does, solely from dismissal of the complaint for failure to state a cause of action, this appeal involves review limited in scope to determining whether the administrative interpretation of the Social Security Act is founded upon a rational basis; and does not present an issue regarding the validity of appellant's interpretation of that act

Assuming, arguendo, this subject matter is properly within the Court's jurisdiction, the question then arises as to the scope of review on appeal. In the District Court appellant had filed his complaint, and appellee had made a motion to dismiss the complaint. No motion for summary judgment, or answer to the complaint was entered. Appellee's motion to dismiss was upon alternative reasons: (1) lack of jurisdiction because of immunity of the sovereign, and (2) failure to state a claim upon which relief may be granted. In its opinion (J. A. 44) the District Court rejected the argument that this suit was against the sovereign. Therefore, in dismissing the complaint, the District Court found the complaint did not state a cause of action. Clearly, as a matter of appellate review, this Court has before it only the question whether the complaint does or does not state a cause of action. Assuming the Court does find that a cause of action is stated by the complaint, the proper and sole action open to the Court is to remand this case with directions that the complaint be reinstated. Appellant may obtain affirmative approval of its interpretation of the statute, only after further proceedings in the District Court on remand.

The scope of judicial review of administrative action was properly detailed by the District Court. Appellant states that "[i]n the instant case, the entire issue turns on the proper interpretation of statutory language." (Brief, page 35). This argument is subject to the infirmity that the statute had previously been interpreted by the Administrtator, in a manner adverse to appellant (J. A. 39–42); and has now been upheld by the District Court with a finding the interpretation rested upon a "rational basis." At this stage of the case the proper scope of review is solely to determine whether there is a rational basis

for the Administrator's interpretation. Once that rational basis has been disclosed, review must come to an end. Appellant's use of the word "proper" is correct only in the sense that the issue here is whether there is a rational basis for the Administrator's interpretation. If such rational basis is found then the Administrator's interpretation is *the* proper interpretation. *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U. S. 143, 67 S. Ct. 245, 91 L. Ed. 136 (1946); *Brannan* v. *Stark,* 87 U. S. App. D. C. 388, 185 F. 2d 871 (1950), *affirmed* 342 U. S. 451 (1952); *Hammond* v. *Hull,* 76 U. S. App. D. C. 301, 131 F. 2d 23 (1942), *cert. denied* 318 U. S. 777 (1943); *Cargo Carriers* v. *Snyder,* 104 F. Supp. 258 (D. C. D. C. 1952), *affirmed* by this Court as No. 11,534 on July 16, 1953; *State of Indiana* v. *Ewing,* 99 F. Supp. 734 (D. C. D. C. 1951), remanded as moot 90 U. S. App. D. C. 420, 195 F. 2d 556 (1952).

Appellant's attempt to distinguish the *Hammond* case on its facts, can be of little avail when the general principle of law there stated has been reiterated by both the Supreme Court and this Court. The scope of review in the instant case was clearly settled in *Brannan* v. *Stark,* supra, at page 875, wherein the test was said to be the existence of a "reasonable basis in law."

III

The term "retirement system" in section 418 (d), as defined in section 418 (b) (4), 42 U. S. C., includes the retirement system covering these employees of the City of Louisville Municipal Housing Commission

Appellants in their brief contend that employees of the City of Louisville Municipal Housing Commission are eligible for coverage by agreement between the Administrator and the State of Kentucky, even though they are now covered by a retirement system, because the term "retirement system" as defined in section 218 (b) (4) of the Social Security Act and as used in section 218 (d) of the Act relates only to retirement systems established by legislative action of States or political subdivisions, limited in coverage to public employees, and administered by public officials. This, it is argued, is the clear meaning of the term "retirement system" in section 218 (b)

(4) of the Act and that such meaning is supported by the legislative history of the exclusion of public employees covered by retirement systems.

In addition, appellants contend that section 218 (d) is an "Exclusion Amendment" which should be strictly construed; that the Administrator's ruling which concluded that the employees of the Housing Commission are ineligible for coverage under the State's section 218 agreement because they are covered by a retirement system, in effect, states that coverage under any type of retirement system, whether or not established by a State or political subdivision, bars coverage under an agreement; and that the ruling is discriminatory.

Section 218 (d) of the Social Security Act (42 U. S. C. 418 (d)) reads as follows:

> No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group.

The term "retirement system" is defined in section 218 (b) (4) of the Act (42 U. S. C. 418 (b) (4)) to mean "a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof."

The Federal Security Administrator, in refusing to agree to coverage of the employees of the Louisville Commission under the Act because the Administrator concluded they were not eligible for such coverage, stated, in part, in a letter to the Commissioner of Economic Security of Kentucky, dated June 4, 1952, attached to the complaint as Exhibit C (pp. 39–42 of Appendix to appellants' brief):

> If our information is correct it would appear that the retirement systems of these housing commissions consist of participation in the plans of the National Health and Welfare Retirement Association. An examination of the provisions made for the payment of retirement benefits to employees of housing authorities which are members of the National Health and Welfare Retirement Associa-

tion convinces us that such authorities have established retirement systems for their employees within the meaning of Section 218 (b) (4) of the Act. The constitution and bylaws of the National Health and Welfare Retirement Association state that the Association is organized for the purpose of providing pension benefits to employees of the Association and the employees of members of the Association. Members of the Association may include local housing authorities. These authorities may participate in the retirement program of the Association if formal action is taken by the governing body of the authority to adopt the program and if at least 75 percent of the employees of the authority consent to participate. Following such action by the authority and its employees, every individual thereafter employed by the authority may participate in the retirement plan. The retirement benefits payable to employees of the authority are financed through contributions made both by the employees and the member housing authority.

From the foregoing, it is apparent that to become a member of the Association, a local public housing authority must first determine that retirement benefits should be provided for its employees and that it wishes to provide such benefits through the Association's plan. While it is true that the details relating to the payment of contributions, the conditions of eligibility, and the terms of payment of benefits are administered by the Association, *it is the action of the local housing authority in adopting the plan of the Association that constitutes the act of establishing a retirement system for the employees of the housing authority. Each local housing authority, in availing itself of membership in the Association and by paying contributions in behalf of its employees to the Association, thus establishes a retirement plan for the payment of benefits to its employees.*

Under the circumstances, therefore, we believe that these housing commissions which are members of the retirement plan operated by the National Health and

> Welfare Association have established a retirement system for their employees within the meaning of Section 218 (b) (4) of the Social Security Act. It also follows from this conclusion that these employees of the housing commissions who are in positions covered by the retirement system on the date that the agreement with the State of Kentucky becomes applicable to the housing commissions would not be eligible for coverage under the old-age and survivors insurance program. [Emphasis supplied.]

This ruling, it is submitted, is a correct ruling under the terms of the Statute. It is well settled that "where no ambiguity exists, there is no room for construction." *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 277–278; *Brotherhood of L., F. & E.* v. *Interstate Commerce Commission*, 79 U. S. App. D. C. 318, 321, 147 F. 2d 312, 315; *Ex parte Collett*, 337 U. S. 55, 61, 69 S. Ct. 944, 947, 93 L. Ed. 1207. In the *Collett* case, the Supreme Court, per Chief Justice Vinson, said:

> Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." Gemsco v. Walling, 1945, 324 U. S. 244, 260, 65 S. Ct. 605, 614, 89 L. Ed. 921. This canon of construction has received consistent adherence in our decisions.

Likewise in this case, the plain words and meaning of the statute here involved are clear. It cannot be reasonably interpreted as the appellants would interpret it. The appellants' interpretation would require reading restrictive language into the above-quoted statutory definition of the term "retirement system."

According to paragraph 10 of the complaint, appellants contend that the term "retirement system" means only "a system

created as a public retirement system by a State or political subdivision thereof through customary legislative action of its governing body." At page 14 of appellants' brief they assert that by the statutory definition of "retirement system" is meant "one which is limited to the State or one or more of its political subdivisions, as distinguished from a general plan operating throughout the United States and Canada," and that it must be "limited in its coverage to public employees, as distinguished from a system covering both public and private employees" and that it must be "one which is administered and under the control and protection of public officials, as distinguished from a system administered and under the control of a private corporation." In effect, appellants urge a construction of the language of section 418 (b) (4) of 42 U. S. C., as though it contained the following words which we have added in brackets:

> The term "retirement system" means a pension, annuity, retirement, or similar [public] fund or system established [and operated] by a State or by a political subdivision thereof [through customary legislative action of its governing body].

There is, however, no justification for ascribing so restrictive a meaning to the definition of "retirement system" in section 418 (b) (4). Appellants assert, however, that the word "established" means "creating something new" only and that it cannot mean "adopting" or "designating" or "acquiring rights under an existing retirement system brought into existence by a private company." Therefore, they contend that for a State or political subdivision to establish a pension system means to set up, and to operate, an entire new system and not merely to avail itself of a system already in operation. First, we do not agree that the word "established" is so circumscribed; and secondly, that, in any event, the action of the Housing Commission which resulted in providing retirement benefits for its employees created "something new" for its employees.

In *State* v. *Town of Lake Placid*, 147 So. 468, 471, 109 Fla. 419 (1933), the court said:

> The word "establish" in common language has various meanings, and the peculiar sense in which it is used

> in any sentence is to be determined by the context. It may be used as to settle firmly, to fix unalterably, to make a form, to create, to regulate, to settle, or to recognize. See *Davenport* v. *Caldwell,* 10 S. C. (10 Rich.) 317.
>
> The word is not limited in its meaning "to found or set up," but is as often employed to signify the putting or fixing on a firm basis or putting in a settled or efficient state or condition an existing legal organization or institution. See *State* v. *Rogers,* 107 Ala. 444, 19 So. 909, 32 L. R. A. 520. See, also, Words & Phrases.

In *Davenport* v. *Caldwell,* 10 S. C. (New Series), 10 Rich., 317, 336, the court said:

> * * * In common language, the same word [establish] has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. * * * as, for example: To settle firmly; to fix unalterably; to make a form and not to fix or settle unalterably; to create; to found and to regulate; to settle, recognize, or support; to ratify; and to confirm.

In *Ex parte Lothrop,* 118 U. S. 113, 119, 6 S. Ct. 984, 30 L. Ed. 108 (1886) the Supreme Court said:

> Something was said in argument about the use of the word "prescribe" in the organic Act of Arizona, and "establish" in that of Florida, but we attach no importance to this. The words are often used to express the same thing, and Webster classes them as synonyms.

Clearly here the Louisville Municipal Housing Commission prescribed a system of pensions or retirement annuity payments for its employees (and admittedly such retirement system is in actual effect and operation) and has thus established a "retirement system" within the meaning of the Act.

The following hypothetical examples demonstrate, we believe, the untenability of the extremely narrow meaning appellants ascribe to the word "established": Suppose a corporation had agreed, under a collective bargaining agreement, to "establish a retirement system" for those of its employees who had been with the corporation for a specified number of years

and who had reached a designated age. Assuming that the collective bargaining agreement did not specify that the corporation must maintain, and control its own retirement fund or system and itself make the retirement payments, could it be seriously contended that the corporation could not meet its contractual obligation to "establish a retirement system" for its employees, by arranging with an insurance company, in consideration of premiums paid to it by the corporation, to make the retirement payments to the corporation's employees entitled thereto?

Suppose, too, by resolution of the board of directors of a corporation, its president or an executive committee was directed to "establish" a system of police protection for the corporation's plants without, however, specifying that the police personnel should be employees of, and directly paid by and be responsible to, the corporation itself. Could it be seriously contended that such a board resolution could not be complied with by a system of police protection for the corporation's plants under a contractual arrangement with a private company engaged in the business of providing protective services to industrial plants?

Contrary to appellant's assertions, it is evident that public housing authorities which are members of the National Health and Welfare Association's retirement plan have established retirement systems for their employees, regardless of the particular meaning ascribed to the word "established." The provisions of the Constitution and By-Laws of the National Health and Welfare Retirement Association, Inc., reveal that the Association is organized for the purpose of providing pension benefits to employees of the Association and the employees of members of the Association. (Constitution of the Association, section 2.) Members of the Association may include local public housing authorities. These authorities may participate in the retirement program of the Association if formal action is taken by the governing body of the authority adopting the program and if at least 75 percent of the employees of the Authority have consented to be made participants. (By-laws of the Association, Article 7, section 2.) Following such action by the authority and its employees every individual thereafter

employed by the authority is eligible to become a participant in the Association's retirement plan. The retirement plan is financed through contributions made both by the employees and the member authority. (By-laws, Article 7, section 2 (5))[1]

Under the constitution and bylaws of the Association it is apparent, therefore, that to become a member of the Association, a local public housing authority must first determine that retirement benefits should be provided for its employees and that it wishes to provide such benefits through the Association's plan. While it is true that the details and procedures relating to the payment of contributions, the conditions of eligibility, and the terms of payment of benefits are administered by the Association, it is clear that it is the action of the local public housing authority which newly creates retirement system protection for its employees and that by such action it has established a retirement system for its employees. The local authority, in availing itself of the plan of the Association and in paying contributions in behalf of its employees to the plan also "settles," "fixes," or "confirms" the plan as its plan for the payment of pensions to its employees; and through its membership in the Association utilized that Association merely as a convenient means of financing the retirement payments under the plan it has "established" for its employees.

The situation which exists in any such case is wholly analogous to that in which an employer (either public or private) contracts with an insurance company on behalf of its employees to insure the payment of the risks undertaken by it under its plan for the retirement of such employees. This method of financing the benefits, however, would not seem to affect the essential nature of the Association's retirement plan; namely, that it is, in fact, a retirement system established by each of the member housing authorities for their employees and is supported by them and their employees through contributions made to the Association.

Thus, although, in one sense, a plan for providing retirement benefits for employees may be in existence, it would have

[1] These provisions of the Constitution and By-Laws of the Association appear also at page 41 of appendix to appellants' brief.

no effect upon a housing authority or its employees unless and until the authority has taken affirmative action to create a retirement system for its employees through its participation in the existing system. It is only when such action is taken that the retirement plan has been created for housing authority employees and also becomes "settled," or "fixed," or "confirmed" or, possibly also, "appointed" or "designated" as the authority's plan.

Moreover, there is no provision in section 418 (b) (4) or 418 (d), supra, nor is there any statement in the committee reports on the 1950 Amendments to the Social Security Act to indicate that only such retirement systems as are publicly administered and completely funded by States or by political subdivisions shall be considered to be retirement systems established by States or by political subdivisions, and that those financed through nonpublic benefit associations or insurance companies cannot be so considered . To attribute such an intent to the Congress would suggest a purpose to create a line of demarcation between retirement systems contrary to reality when consideration is given to the number of governmentally established retirement systems that finance the benefits payable under their plans through contractual arrangements with nonpublic insurance companies and other similar organizations.

It is submitted that the City of Louisville Municipal Housing Commission, by its action in becoming a member, and adopting the retirement plan, of the National Health and Welfare Retirement Association and paying contributions on behalf of its employees to the Association in order to provide pension benefits for them, has established a "retirement system" within the definition given in section 418 (b) (4) of the term "retirement system" as used in section 418 (d), 42 U. S. C., and that, therefore, the employees of said Louisville Commission, who admittedly are covered by said retirement system, are not eligible for coverage under the Federal old-age and survivors' insurance program under Federal-State agreement pursuant to section 418 of 42 U. S. C., being section 218 of the Social Security Act as amended in 1950.

In an attempt to show that the term "retirement system" as used in section 418 (d) and as defined in section 418 (b) (4) of 42 U. S. C., must have been intended to refer only to publicly operated retirement systems established by legislative action, appellants cite the testimony before Congressional Committees of the Chairman of Legislative Committee National Conference on Public Employee Retirement System, the Legislative Chairman of the Civil Service Forum of the State of New York and its component organization, the Civil Service Forum of New York City; a member of the Retirement System of the City of Chicago, the First Vice President and General Counsel of the National Association of Retired Civil Employees; the Executive Vice President and Treasurer of The Pensioners Protective Association of America, Inc., and other witnesses concerned with avoiding the necessity of accepting coverage under the Federal old-age and survivors insurance system to the possible detriment of their coverage under pension systems of the various States or political subdivisions.

Whether or not those persons representing public employees who did not wish to be covered under the Federal old-age and survivors insurance program, did, in fact, represent only employees under retirement plans established by legislative action, is speculative. In absence of evidence that they represented only those under retirement systems established by legislative action, it can hardly be assumed that they were requesting Congress to adopt a narrow retirement system exclusion in the law, particularly since such a restricted exclusion might result in some public employees under retirement systems being excluded and others, also represented by those who testified against coverage, in being covered. Certainly this testimony cannot be read to relate only to retirement systems established by legislative action. On the contrary, in view of the pronounced opposition to coverage under the Federal program by those who preferred to remain under their own systems it would seem more reasonable to infer that those who testified wished to insure retention of their coverage under their local systems and their exclusion from the Federal system, regardless of whether or not such local systems were established by legislative action

or established in other ways by States and political subdivisions of the States.

Likewise, an examination of the statement of Senator George, Chairman of the Senate Committee on Finance, cited on page 24 of appellants' brief, makes no reference to retirement systems established by legislative action. It does not even contain the word "public." It states that the Senate Committee, after listening to the testimony of persons who had come from all parts of the country, "was unanimously of the opinion that State police officers, firemen, and school teachers in the several States and municipalities ought not to be forced under the Federal Social Security System." But nowhere in this statement does it appear that Senator George was alluding to retirement systems established by legislative action as distinguished from any other types of systems. The contrary is clearly indicated by the fact that Senator George, as Chairman of the Senate Committee on Finance, submitted Senate Report No. 1669, 81st Congress, 2d Session, accompanying H. R. 6000, which became the Social Security Act Amendments of 1950 (excerpts from which report are more fully cited later), clearly stating that employees of State and local governments could be "covered only if not under a retirement system" (p. 6), and that "All public employees under a retirement system would be excluded on a mandatory basis" (p. 6), and that "The committee-approved bill would not cover * * * State, and local government employees covered under retirement systems" (p. 10), and that "no employees in positions covered by *any* retirement system may be covered by an agreement" (p. 113). [Emphasis supplied.]

Apart from the fact that the cited testimony of the witnesses is inconclusive with respect to whether they wanted an exclusion which would be limited only to such retirement systems as were established by legislative action, such testimony is, at best, of only very doubtful value in the interpretation of the statute. In *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 80 U. S. App. D. C. 119, 149 F. 2d 507, 510 (1945); affirmed 326 U. S. 446, this Court said:

> Finally it is argued that the legislative history of the Act compels the narrow interpretation urged by appellee. In support of this the appellee quotes from the testimony of witnesses at the hearings. Individual opinion of witnesses at a hearing is of doubtful value in the interpretation of an act. * * *
>
> The Board's interpretation of the Act is unquestionably entitled to respect by this court. In the case before us there seems no reason for setting it aside and every reason for affirming it.

At least ordinarily, the Supreme Court will not go beyond the committee reports to construe a Federal statute. *Lapina* v. *Williams*, 232 U. S. 78, 34 S. Ct. 196, 199; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494, 51 S. Ct. 510, 512.

In any event, such legislative history, even if it supported the contention of the appellants, which it does not, could not overcome the plain words and meaning of the statutory definition of the term "retirement system." As the Supreme Court said in *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, at p. 260:

> The argument from the legislative history undertakes, in effect, to contradict the terms of § 8 (f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This is such a case.

Or, as the Supreme Court said in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, at p. 492:

> We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of

the Act itself or of subsequent legislative proposals which failed to become law.

It is manifest, therefore, that the language of the statute cannot be contradicted by any legislative history "where [as here] the statutory language is clear." *Ex parte Collett*, 337 U. S. 55, 61, *supra*.

Moreover, it is clear from the language of the 1950 Amendments to the Social Security Act that the term "retirement system" in section 418 (d), and defined in section 418 (b) (4), 42 U. S. C., is not, and cannot be, confined in its applicability to retirement systems established by legislative action of a State or a political subdivision of a State. References to retirement systems appear in sections 410 (a) (7) (A), 410 (e) (2), (3), and (4), as well as in sections 418 (b) (4) and 418 (d), 42 U. S. C. Significantly, too, the specific language describing the retirement systems referred to in these sections, differs.

Thus, in section 410 (a) (7) (A), Congress, in describing a class of Federal employees excluded from coverage under the old-age and survivors insurance program speaks of those "covered by a retirement system established by a law of the United States." In section 410 (e) (2) relating to covered transportation services, Congress refers to two distinct types of retirement systems. In section 410 (e) (2) (A), coverage under the old-age and survivors insurance program is denied, in the case of certain employees of State and local government transportation systems, to those "covered under a general retirement system providing benefits which, by reason of a provision of the State constitution dealing specifically with retirement systems of the State or political subdivisions thereof, cannot be diminished or impaired." In section 410 (e) (2) and section 410 (e) (3), Congress further refers to the coverage of transportation system employees under a "general retirement system." This term is defined in section 410 (e) (4) (A) as "any pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof for employees of the State, political subdivision, or both." But this term is also further defined in the same section so as not to include a fund

or system which covers only service performed in positions connected with the operation of a public transportation system.

The limitations on the types of retirement systems referred to by Congress in sections 410 (a) (7) (A) and 410 (e), namely, "established by law" or providing for benefits which are guaranteed against diminution or impairment by a provision in a State constitution dealing specifically with retirement systems or that the system must be "a general retirement system," do not appear, however, in the definition of retirement system in section 418 (b) (4). For the purpose of voluntary agreements entered into under section 418, the term "retirement system" is defined broadly. This definition, in contrast to the more limited definitions elsewhere in the law, speaks in terms of any retirement system established by a State or a political subdivision of a State.

Obviously, Congress is empowered to define terms in a statute and such definitions must be given full effect in construing the statute. *Von Weise* v. *Commissioner of Internal Revenue,* 69 F. 2d 439 (8th Cir. 1934), cert. denied 292 U. S. 655. Obviously, too, where different language is used in the same or a similar connection in different parts of a statute, it is presumed that the legislature intended a different meaning and effect. *People* v. *Campbell,* 291 Pac. 161, 162 (Cal. App. 1930); *Black, Interpretation of Laws* (2d Ed.) p. 145.

The phrase "established by law," as distinguished from the word "established" has uniformly been construed to mean "established pursuant to legislative authority" or "established by legislative action." See, *In re Mutual Life Insurance Company,* 89 N. Y. 530 (1882); *Dane* v. *Smith,* 54 Ala. 47 (1875); *Healey* v. *Dudley,* 5 Lans. (N. Y.) 115, 120 (1871). On the other hand, the word "established" includes, among its several meanings, "settled, fixed or confirmed." *Suit* v. *State,* 17 S. W. 458, 459 (Tex. App. 1891); *Armstrong* v. *George,* 114 Pac. 209, 210 (Kans. 1911); and by some courts it has also been held to mean "appointed" or "designated." See *State ex rel Matacia* v. *Buckner,* 254 S. W. 179 (Mo. 1923). See also definitions of "establish" which we quoted above from *Davenport* v. *Caldwell,* 10 S. C. (New Series), 10 Rich. 317 (1877) ("* * * to settle, recognize or support; to ratify; * * * to confirm.");

State v. *Town of Lake Placid,* 147 So. 468, 471, 109 Fla. 419 (1933) ("to settle, or to recognize"), and *Ex parte Lothrop,* 118 U. S. 113, 119, 6 S. Ct. 984, 30 L. Ed. 108 (1886) in which the Supreme Court considered the words "establish" and "prescribe" to be synonyms.

It is apparent, therefore, that while Congress in section 410 (a) (7) (A) intended to exclude from coverage under the old-age and survivors insurance program, Federal employees covered by retirement systems enacted by Congress, it could not have intended to restrict the exclusion of State and local government employees in section 418 (d) to those under retirement systems established by legislation. Had Congress intended to do so, it could very easily have used parallel language or, as in the case of the retirement system exclusion applicable to transportation system employees, specifically detailed the limitations under which it should apply. The fact that it did not, but defined the exclusion in section 418 in broad terms, can lead only to one conclusion, namely, that it intended the retirement system exclusion in section 418 (d) to apply to all State and local government employees covered by retirement systems established by States and political subdivisions of the States regardless of how they established such systems.

Accordingly, it must be held that the retirement system exclusion in section 418 is not restricted in its applicability to retirement systems established by legislative action of States or political subdivisions of States. We believe too, that this view is more in keeping with the legislative intent of the provision than the restricted position contended for by appellants in that it would result in preventing States and political subdivisions from covering under section 418, those State and local government employees who, according to the statement of the Chairman of the Senate Committee on Finance, preferred to remain covered, for retirement benefit purposes, under their own existing systems.[2]

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[2] Since appellants (at p. 13 of their brief) concede "that the Louisville Commission is a political subdivision," the resolution or resolutions of its governing body in connection with having the Commission become a member of the National Health and Welfare Association and participating in a retirement plan covering the Housing Commission's employees, could be considered to be legislative action of the governing body of the Commission. See *City of Oakland* v. *Hogan,* 106 P. 2d 987, 992–93, 41 Cal. App. 2d 333;

This, moreover, is further clearly evidenced by the Congressional Committee Reports on H. R. 6000 which became the Social Security Act Amendments of 1950. In Senate Report No. 1669, 81st Congress, 2d Session, there appear the following pertinent statements:

> (e) Employees of State and local governments: *Covered only if not under a retirement system* and if State enters into an agreement with the Federal Government. *All public employees under a retirement system would be excluded on a mandatory basis* (p. 6). [Emphasis supplied.]
>
> The committee-approved bill would not cover * * * State, and local government employees covered under retirement systems; (p. 10).
>
> 3. *Employees of State and local governments.* Under present law, employment by State and local government units is not included in the coverage of the old-age and survivors insurance system. *Under the committee-approved bill, all such employment which is not under an existing retirement system* could be covered through voluntary agreements between the States and the Federal Security Administrator.
>
> * * * * *
>
> The House-approved bill has substantially the same provisions with respect to State and local government employees *not covered by retirement systems* as has the committee-approved bill. In addition, however, the former would permit members of an existing retirement system to be covered if such members and the beneficiaries of the system so elected by a two-thirds majority vote. Your committee received overwhelming testimony against permitting such coverage and so has specifically prohibited it * * * (pp. 13–14). [Emphasis supplied.]

Gorman v. *City of Peabody*, 45 N. E. 2d 939, 312 Mass. 560; *State ex rel Doty* v. *Styke*, 199 S. W. 2d 468, 29 Tenn. App. 620. If appellants' contention as to the meaning of "retirement system" is correct, neither the City of Louisville Municipal Housing Commission nor any similar "political subdivision" of a State, could "establish" a "retirement system" except pursuant to legislative action by the State itself.

> Paragraph (4) defines "retirement system" as "any pension, annuity, retirement, or similar fund or system" established by a State or political subdivision. The definition of "State-wide retirement system" included in the House bill is not needed *since no employees in positions covered by ANY retirement system may be covered by an agreement* (p. 113). [Emphasis supplied.]

In House Report No. 1300, 81st Congress, 1st Session, there appears the following pertinent statement:

> (b) Employees of State and local governments, if the State enters into a voluntary compact with the Fedederal Security Agency (except for certain transit workers who are covered compulsorily), *provided that such employees who are under an existing retirement system* shall be covered only if such employees and adult beneficiaries of the retirement system shall so elect by a two-thirds majority (about 3.8 million) (p. 6).

The committee of conference adopted the Senate provisions. In the Conference Report, House Report No. 2771, 81st Congress, 2d Session, p. 100, it is stated:

> The House bill provided for the extension of old-age and survivors insurance coverage to employees of State and local governments under agreements negotiated between the States and the Federal Security Administrator. The House bill also permitted the employees of State and local governments, covered by State or local government retirement systems, to be included in such agreements if two-thirds of the employees consented to be covered under the program. The Senate amendment modified the House provisions. It excluded from the purview of such agreements employees of States and local governments covered by State and local government retirement systems. * * * The conference agreement adopts the Senate provisions.

Appellants, at page 23 of their brief, quote part of this last-quoted paragraph from the Conference Report, and at page 24

of their brief they ascribe an obviously erroneous meaning to the presence of the word "government" in the Conference Report's reference to "employees of State and local governments covered by State and local government retirement systems." Appellants treat the word "government" immediately preceding the words "retirement systems," as qualifying and limiting the type of "retirement systems." We submit that the presence here of the word "government" was not intended to have that effect, and that it is merely part of the phrase "State and local government," the words "local government" being used as the equivalent of the term "political subdivision" used in the bill both before its enactment and as actually enacted.

In the light of the clearly worded statements which we have quoted above from both the Senate and the House Reports, and in view of the fact that, at the conference, the House agreed to the Senate provisions, we do not believe it would be reasonable to construe the quoted statement from the Conference Report as meaning that the conferees had agreed to the exclusion of only such employees of State and local governments as were covered by retirement systems established by legislative action and operated by the State or local government itself.

Further, neither section 418 (d) nor section 418 (b) (4) of 42 U. S. C. contains the words "public" or "government" (nor the phrase, "established by legislative action"). Likewise, neither of these words appears in the heading of section 418 (d), which reads as follows:

"Exclusion of Positions Covered by Retirement Systems"

This heading, assuming there were any ambiguity relative to the meaning of the provisions of section 418 (d), would tend to support appellees' rather than appellants' interpretation of the statutory language.

As stated in 82 *C. J. S.*, Statutes, pp. 734–735:

> For the purpose of explaining and clearing up ambiguities in the enacting clauses of statutes, reference may also be had to the headings of portions of statutes, such as titles, articles, chapters, and sections; but, where the meaning of the enacting clause is clear, it cannot be controlled by the headings thereof, especially

> where the headings have been prepared by the compilers and not by the legislature.

Here the heading of the section in question was prepared by Congress. The sectional heading—"Exclusion of Positions Covered by Retirement Systems"—appears not only in the final enactment of H. R. 6000 (Social Security Act Amendments of 1950), but also in the Senate Committee prints of H. R. 6000 (at p. 124, of May 9, 1950 print and p. 126 of May 16, 1950 print) and in the Conference Committee print of H. R. 6000 (at p. 118).

In any event, and particularly assuming that (in accordance with the dictum of District Court) there is ambiguity as to the meaning of the statutory language, the Court should give great weight to the contemporaneous administrative construction of the statute. As this Court had occasion to say in *West Texas Utilities Co.* v. *National Labor R. Bd.*, 87 U. S. App. D. C. 179, 184 F. 2d 233, 235 (1950):

> The Supreme Court has admonished us many times to give "great weight" to an agency's interpretation of its governing statute, especially where the legislative intent is ambiguous. Such deference keeps the inexpertness of courts, which must deal with the whole gamut of the law, from distorting the policy of Congress in complex areas of the economy requiring specialized skills and scrutiny. It minimizes the danger that lay constructions will be given to words which are terms of art to those schooled in their special fields. * * *

The contemporaneous administrative construction of the statute by the Federal Security Administrator (now Secretary of Health, Education, and Welfare) is entitled to great weight. *McLaren* v. *Fleischer*, 256 U. S. 477, 481; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549. In the *American Trucking Association* case, which involved the question of the meaning of the word "employee" ("the sweep of the word employee") as used in section 204 (a) of the Motor Carrier Act of 1935, the Supreme Court, in affirming the administrative interpretation, said in part:

> The Commission and the Wage and Hour Division, as we have said, have both interpreted Section 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." * * *

In their brief, appellants repeatedly refer to section 418 (d) of 42 U. S. C., as the "Exclusion Amendment." The use of this term tends to imply that Congress by amendment of the Social Security Act provided an exclusion from coverage which existed or was permitted prior to the amendment. This, of course, is not so. As is correctly shown at pages 2–3 of appellants' brief, the same statute, namely, the Social Security Act Amendments of 1950 (Act of August 28, 1950), which, for the first time, permitted the extension of coverage (by voluntary Federal-State agreements) to employees of a State or political subdivision thereof, at the same time contained the provisions which appellants now refer to as the "Exclusion Amendment."

At page 9 of appellants' brief it is further stated that the "effect of the Administrator's ruling" is "to exclude all public employees who were in *any* retirement system—including both public and private retirement systems." This also is not so. The administrator has never ruled that *any* retirement system covering public employees is a "retirement system" within the meaning of section 418 (d), or 418 (b) (4) which defines "retirement system." The Administrator has held, however, that the retirement system covering the employees of the City of Louisville Municipal Housing Commission is a "retirement system" within the meaning of sections 418 (b) (4) and 418 (d) of 42 U. S. C.

Finally, it is contended under point "B" in appellants' brief, that "to avoid unreasonable and discriminatory results, it is necessary to construe the Exclusion Amendment as not applying to public employees under private retirement systems." The several hypothetical examples of apparently discrimina-

tory results pointed out under point "B", are not discriminatory. Differences in results would be unavoidable even under appellants' contention as to the meaning of the term "retirement system." These differences are inherent in the fact that Congress made the question of excluding employees of a State or political subdivision thereof under 42 U. S. C., Sec. 418 (d), depend upon whether they were "members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group."

On the other hand, the construction of sections 418 (b) (4) and 418 (d) of 42 U. S. C., contended for by appellants, if adopted, would clearly result in discrimination in favor of employees of the Housing Commissions. These employees, like other State and local government employees, are public employees. Yet merely because they are covered under retirement systems established under contractual arrangements by Commissions with private insurance companies, they could be covered also under the Federal old-age and survivors insurance program, whereas other State and local government employees similarly situated or performing identical services, but covered under State or municipal plans established by legislation and operated by the State or political subdivision itself, could not. Obviously, whether or not public employees of States and local governments should be covered by retirement systems; how they should be covered; and how such coverage should be financed are matters of State and local government concern, and not Congressional concern. Congress was merely concerned with excluding from coverage by Federal-State agreements under 42 U. S. C. 418 public employees already covered by established retirement systems. Congress could not have been concerned with who should be so covered, how they should be covered, or how such coverage should be financed by the States or their political subdivisions, and in its definition of "retirement system" used clear language to show that it did not intend to discriminate in favor of public employees covered by a one class of retirement system as against other public employees covered by other types of retirement systems.

Moreover, it is incorrect to assume, as appellants seem to imply in their brief (Appellants Brief, page 27), that it would

not involve an additional expenditure of public funds for the support of two systems covering the same employees to permit agreements to cover under the Federal old-age and survivors insurance program employees of Housing Commissions already covered by retirement systems. Housing Commission funds are public funds to the same extent as funds derived by taxation and to the extent they would be used to defray the cost of both the existing retirement system coverage of the employees and the coverage of the Federal old-age survivors insurance program, there would be involved an expenditure of public funds over and above the amount now expended.

It is submitted, therefore, that the term "retirement system" includes the retirement system established by the City of Louisville Municipal Housing Commission, and that the employees ef the Louisville Commission, who admittedly are covered by such retirement system, are not eligible for coverage under the Federal Old-Age and Survivors Insurance program.

CONCLUSION

Wherefore, we respectfully submit the ruling of the District Court, in dismissing this complaint, should be affirmed.

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